

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

178

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,285

JOHN F. BANZHAF, III, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, *Respondents.*

Nos. 21,525, 21,526

WTRF-TV, INC., and NATIONAL ASSOCIATION
OF BROADCASTERS, *Petitioners,*

v.

United States Court of Appeals
for the District of Columbia Circuit
FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, *Respondents.*

FILED MAY 6 1968

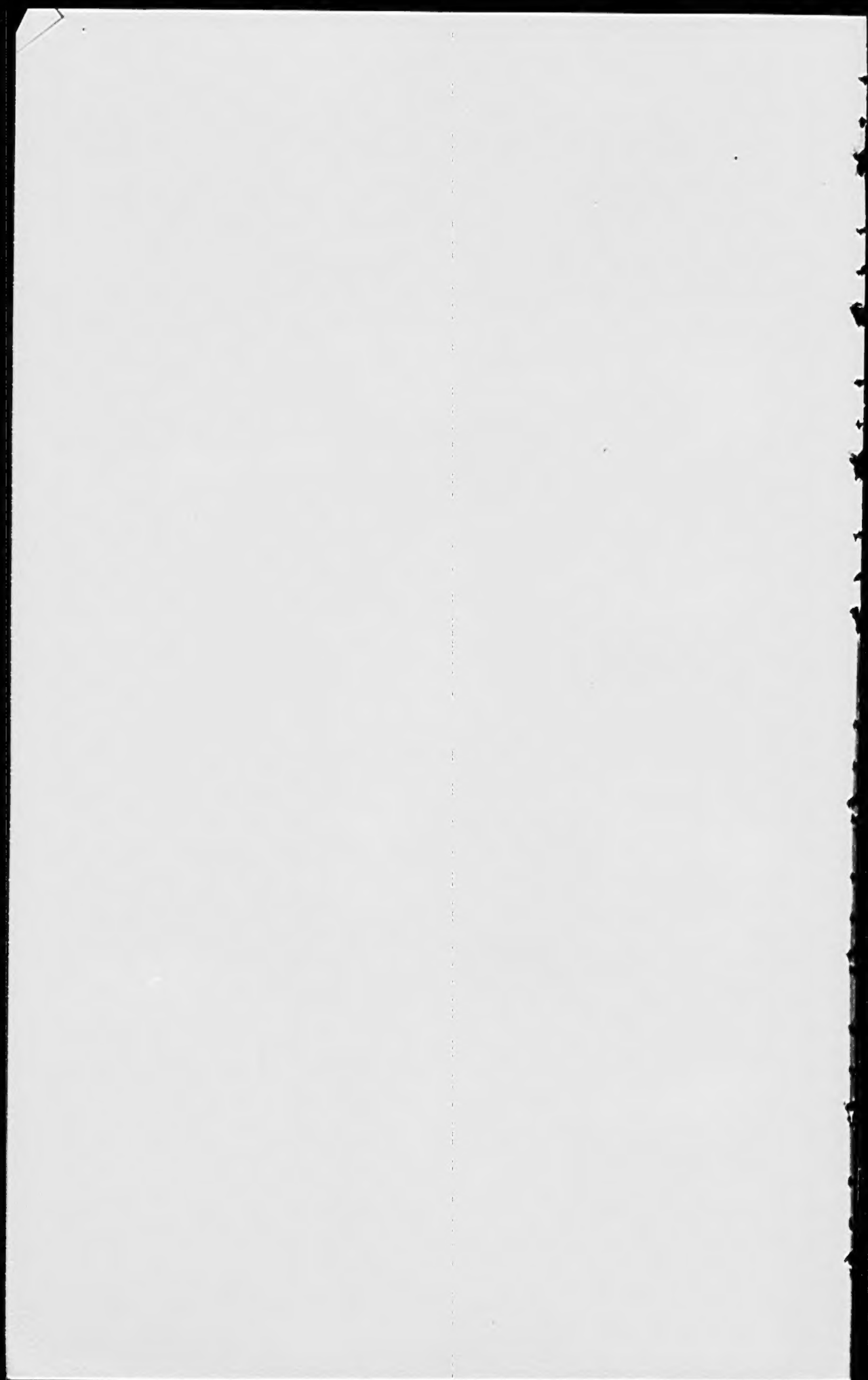
No. 21,577

Nathan J. Paulson
CLERK
THE TOBACCO INSTITUTE, ET AL., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, *Respondents.*

On Petitions To Review Orders of the
Federal Communications Commission



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JOINT APPENDIX

1

1368 Metropolitan Avenue
New York, New York 10462
January 5, 1967

Broadcast Bureau
Federal Communications Commission
Washington, D. C.

Dear Sirs:

Kindly consider this letter as a formal complaint by the undersigned against television station WCBS-TV, 51 West 52 St., N.Y.C., broadcasting on channel 2 in New York City, for failure to fulfill what I believe to be its obligations under the "fairness doctrine" with respect to cigarette advertisements.

In a letter dated December 1, 1966 and sent to WCBS-TV by certified mail receipt requested (COPY ATTACHED, and hereby made a part of this complaint), I expressed the opinion that certain cigarette advertisements presented a point of view on a controversial issue of public importance; i.e., the advisability and benefits of smoking. At that time I referred in general to the great many cigarette commercials, broadcast day after day, which by their portrayals of youthful or virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations deliberately seek to create the impression and present the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life. In accordance with F.C.C. requirements, I objected in particular to three advertisements, all of which were broadcast on WCBS-TV, Channel 2 in New York City, on November 24, 1966: (1) an advertisement for Marlboro cigarettes, at approximately 2:34 P.M. (approx. 1 min. in duration) prominently featuring strong virile outdoor men smoking in a western woodlands scene; (2) an advertisement for Marlboro cigarettes, at approximately 8:00 P.M. (approx. 1 min. in duration) prominently featuring cowboys smoking in a western ranch scene complete with horses; (3) an advertisement for Pall Mall cigarettes, at approximately

10:14 P.M. (approx. 1 min. in duration) prominently featuring well-dressed sophisticated people enjoying cigarettes as they congregate about a pool table. Finally, in that letter, I requested that responsible organizations be provided with free broadcast time in order to present contrasting views on the issue of the benefits and advisability of smoking.

In a second supplemental letter dated December 20, 1966 and sent certified mail receipt requested to WCBS-TV in New York City, I specifically requested that such free broadcast time be made available to me as a responsible spokesman for such opposing viewpoints. I briefly outlined my qualifications and indicated that I would seek to work closely with other responsible organizations and individuals.

In a letter dated December 30, 1966 (COPY ATTACHED), Clark B. George, Vice President and General Manager of WCBS-TV replied in part to my letters as follows: "we do not believe there is a legal basis for your request and accordingly we respectfully reject your request for free time." He further says that "it would appear unnecessary to consider whether the fairness doctrine can properly be applied to commercial announcements solely and clearly aimed at selling products." However, that was exactly the point of my letters and it is now the subject of this complaint.

2 In defense of his position, Mr. George points to WCBS-TV's record of news coverage on the smoking issue. But by his own admission these broadcasts featured presentations of both sides of the issue. Moreover, even if all of the broadcasts he cites—which appear to total no more than four hours—were devoted completely to presenting the anti-smoking point of view, they would not begin to offset the effects of paid advertisements, prepared by highly skilled experts to maximize their persuasive power, and broadcast day after day after day for

a total of five or ten or even more minutes per broadcast day. It is against this background that the instant complaint is made and it would seem to serve no useful purpose to catalog the extent of such cigarette commercials for comparison with WCBS-TV's other broadcasts concerning smoking because the results of such a comparison would be obvious to any regular viewers.

Mr. George points to advertisements for aspirin, soft drinks, beer, etc. and suggests that the fairness doctrine is not designed to regulate product advertising. While this is obviously true in the case of most consumer products and services because their use or relative merits are not a "controversial issue of public importance," the doctrine may properly be applied and I feel should be applied where as here the effects and use of the product has generated a great public controversy affecting the health and lives of millions of our citizens. Such an application would clearly be in the public interest and consistent with the Surgeon General's recommendation, congressional legislation, the activities of other governmental bodies, and the F.C.C.'s own precedents.

I therefore formally complain that WCBS-TV has broadcast and appears to be continuing to broadcast a large number of messages presenting only one side of a controversial issue of public importance (a few of which have been specifically identified and many more of which are obvious to any viewer) and that they have refused a proper and reasonable request under the fairness doctrine to make corresponding free time available either to recognized and responsible anti-smoking organizations or to the undersigned to present contrasting viewpoints. I specifically request that this complaint be investigated and that necessary and appropriate action be taken against WCBS-TV.

Yours truly,

/s/ JOHN F. BANZHAF III
John F. Banzhaf III

CC: Rosel H. Hyde, Chairman, Federal Communications Commission

Paul Rand Dixon, Chairman, Federal Trade Commission

Senator John O. Pastore, Chairman, Communications Subcommittee

Senator Warren Magnuson, Chairman, Senate Commerce Committee

Senator Robert F. Kennedy

Senator Jacob K. Javits

Chairman, Communications Subcommittee, House of Representatives

Chairman, Commerce Committee, House of Representatives

3 CERTIFIED MAIL RECEIPT REQUESTED

1368 Metropolitan Avenue
New York, New York 10462
December 1, 1966

Television Station WCBS-TV
51 West 52 Street
New York, New York

Dear Sirs:

I am writing to inquire how you intend to fulfill what I believe to be your obligations under the Federal Communications Commission's "fairness doctrine" (29 Fed. Reg. 10415-427 (1964); 47 U.S.C. 315) with respect to certain cigarette advertisements being broadcast on your station, and why you have not made a reasonable and good faith effort to broadcast a balanced presentation of views on the issue of the merits of cigarette smoking.

In accordance with the Commission's requirements, I refer specifically to several commercials which I have observed, a list of which appears at the end of this letter.

I refer in general however to all cigarette advertisements which by their portrayals of youthful or virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations deliberately seek to create the impression and present the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life.

The F.C.C.'s "fairness doctrine" applies "in any case in which broadcast facilities are used for the discussion of a controversial issue of public importance." (p. 10416) Its purpose is to insure that its licensee stations will afford "reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance." (p. 10416) In such situations, the broadcaster must "affirmatively endeavor to make his facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented." (p. 10426) In other words, the licensee must act "reasonably and in good faith to present a cross-section of opinion on the controversial issue presented." (p. 10427) Moreover, if he cannot find proponents of contrasting views willing to pay for broadcast time, he must make such time available without charge to responsible organizations willing and able to present the other side of the issue.

I believe that cigarette advertisements of the type referred to fall within this rule and that you have an obligation as a public licensee to devote a reasonable amount of broadcast time to presentations of opposing views; i.e., that smoking is a danger to health, not a sign of manliness, and not a sophisticated and generally accepted social grace. The issues seem to be simply these: (1) are your broadcasts exempt because they are sponsored commercial messages; (2) do the broadcasts present a position on a "controversial issue of public importance"; (3) do these broadcasts or other broadcasts on your station constitute a balanced presentation of both sides of the issue.

It has been held several times that the "fairness doctrine" applies to paid advertisements. Thus the F.C.C. held that paid political spot advertisements fell within this doctrine. (Letter to Lawrence M. C. Smith, FCC 63-358, 25 R.R. 291, April 17, 1963) In another case, an organization sought free time to broadcast opinions contrary to those presented on a sponsored daily commentary program. The F.C.C. ruled that where the licensee "has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and thus leave the public uninformed—on
 4 the ground that he cannot obtain paid sponsorship for that presentation." (Letter to Cullman Broadcasting Co., Inc., FCC 63-849, Sept. 18, 1963) This rule was recently reaffirmed in the case of the Red Lion Broadcasting Co.

The question of the advisability of smoking is clearly a controversial issue of public importance. The "Terry Report" (Smoking and Health: Report of the Advisory Committee to the Surgeon General of the U.S. Public Health Service) concluded that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." The view that cigarette smoking is harmful to health, not a social necessity, and a habit to be discouraged is taken by a large number of public spirited organization, many members of Congress, and a large number of authors and publications. On the other side of the controversy are the major tobacco companies and their trade organizations which maintain that the case against smoking has not been proved and that the habit is a pleasant socially desirable one. They spend approximately 240 million dollars a year promoting their views through their advertising, approximately 200 million of which is spent for radio and television advertising. On the second issue of public importance, the question of the desirability of smoking affects the health

and very lives of millions of Americans, particularly those who are at an age where the habit is normally acquired. Also, any significant change in the Nation's smoking habits could drastically affect the seven billion dollar cigarette industry.

Clearly cigarette commercials do not present a balanced presentation of views on this controversial issue of public importance. This was most strongly stated by E. William Henry when he was Chairman of the F.C.C.: "From the cigarette advertising presently being carried on radio and TV stations, no one would ever know that a major public controversy is in progress as to the harmful effects of cigarette smoking on the American public. . . . Television viewers, in particular, are led to believe that cigarette smoking is the key to fun and games with the opposite sex, good times at home and abroad, social success and virility." (Speech reported in N.Y. Times, March 30, 1966) Just as clearly there are responsible organizations—such as the National Interagency Council on Smoking and Health and its individual members—who would be willing to present reasonable and responsible arguments to the contrary if free broadcast time were provided.

The Federal Communications Commission should have little trouble deciding the issues raised by this letter. In the past they have ruled that topics such as the nutritive qualities of white bread, the value of Krebiozen, and the use of high potency vitamins without medical advice fell within the "fairness doctrine." (Report on "Living Should Be Fun" Inquiry, 33 FCC 101, 107, 23 R.R. 1599, 1606, July 18, 1962) They have recognized that issues upon which Congress holds hearings and debates are controversial issues of public importance. (Letter to WSOC Broadcasting Co., FCC 58-686, 17 R.R. 548, 550, July 16, 1958; New Broadcasting Co. (WLIB), 6 R.R. 258, April 12, 1950) The importance of the issue of cigarettes and advertising is attested to by the extensive hearings held by the F.T.C., the number of bills introduced in Congress on the subject, the passage of one of those bills into Public Law 89-92

requiring warnings on cigarette packages, and the subsequent decisions by the F.T.C. and bill by Senator Magnuson to strengthen the Federal Cigarette Labeling and Advertising Act. Finally, the F.C.C. has ruled that a licensee has a particular duty to insure that the requirements of fairness are satisfied when it presents a viewpoint on a matter in which it has a financial interest. (Letter to WNEP-TV, FCC 65-852, Sept. 22, 1965 and rulings cited therein)

5 It might be argued that cigarette advertisements merely extol the virtues of the individual brands and do not express an opinion on the merits of smoking. Such an argument must fail however when one considers the relatively insignificant differences between brands, the high degree of brand loyalty among smokers, and the fact that to survive cigarette manufacturers must continue to attract new customers as they come of age. The latter is strikingly underscored by recent statistics showing a decrease in adult smoking following the Terry report counterbalanced by increases in smoking among young people. The argument is further refuted by the tendency of advertisers to use youthful or manly (rugged or virile looking) models in their commercials and by their own recognition of the dangers involved in featuring such commercials on programs intended primarily for teen-age audiences. Clearly cigarette advertisers "discuss" the issue of smoking within the meaning of the doctrine through their presentations of dramatizations purporting to show the pleasures and wide-spread appeal and social acceptance of smoking.

If by December 16th I have not received a satisfactory answer to my request that responsible groups be granted free time, roughly in proportion to that now spent on your station promoting the virtues and values of smoking, in order to present contrasting views on this controversial issue of public importance, I shall make a formal complaint to the Broadcast Bureau of the Federal Communications Commission. You will note that I am forwarding a copy

of this letter to them as well as to others who may be interested in this matter.

This letter refers specifically to the following three commercials, all of which were broadcast on WCBS-TV, Channel 2 in New York City, on November 24, 1966: (1) an advertisement for Marlboro cigarettes, at approximately 2:34 P.M. (approx. 1 min. in duration) prominently featuring strong virile outdoor men smoking in a western woodlands scene; (2) an advertisement for Marlboro cigarettes, at approximately 8:00 P.M. (approx. 1 min. in duration) prominently featuring cowboys smoking in a western ranch scene complete with horses; (3) an advertisement for Pall Mall cigarettes, at approximately 10:14 P.M. (approx. 1 min. in duration) prominently featuring well-dressed sophisticated people enjoying cigarettes as they congregate about a pool table.

Yours truly,

/s/ JOHN F. BANZHAF III
John F. Banzhaf III

cc: Broadcast Bureau, Federal Communications Commission (certified mail, receipt requested)
Rosel H. Hyde, Chairman, Federal Communications Commission
Paul Rand Dixon, Chairman, Federal Trade Commission
Senator John O. Pastore, Chairman, Communications Subcommittee
Senator Warren Magnuson, Chairman, Senate Commerce Committee
Senator Robert F. Kennedy
Senator Jacob K. Javits
Chairman, Communications Subcommittee, House of Representatives
Chairman, Commerce Committee, House of Representatives

6 WCBS-TV
CBS Television Stations
A Division of Columbia Broadcasting
System, Inc.
51 West 52 Street
New York, New York 10010
(212) 765-4321

Clark S. George, Vice President
General Manager

Dear Mr. Banzhaf:

Thank you for your December 1 and December 20, 1966 letters concerning the broadcast by WCBS-TV of cigarette commercial announcements. Your letters urge that, as a result of the broadcast of these cigarette commercials, the station has in some fashion failed to meet its obligations under the Federal Communications Commission's fairness doctrine.

Citing the fairness doctrine you request that "free broadcast time be made available to me as a responsible spokesman" for those opposed to cigarette smoking. For the reasons set forth in this letter we do not believe there is a legal basis for your request and accordingly we respectfully reject your request for free time.

The enunciation by the Commission of the fairness doctrine in its 1949 Report, *Editorializing by Broadcast Licensees*, was based on the Commission's recognition of the need for:

"licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and

often controversial issues which are held by the various groups which make up the community."

- 7 WCBS-TV is well aware of its programming responsibilities in covering controversial issues of public importance. Indeed, in connection with the issue of the health ramifications of smoking, WCBS-TV has afforded to its viewers accurate information on this issue, as well as the significant contrasting viewpoints held by responsible authorities.

So that you may be generally aware of the breadth of this coverage, I would like to call your attention to a number of specific broadcasts. Even prior to the Surgeon General's report in 1964, WCBS-TV broadcast on September 6, 1962, "CBS REPORTS: The Teenage Smoker", a one-hour inquiry into the controversy over the effect of smoking on the nation's health with particular emphasis on the young smoker. When the Surgeon General's committee released its smoking report on January 11, 1964, WCBS-TV broadcast a thirty-minute CBS News Extra "On Smoking and Health" which summarized and discussed the findings of the Surgeon General's report, as well as the reaction to the report from tobacco industry leaders and medical authorities. This special broadcast was closely followed by a one-hour documentary "CBS REPORTS: A Collision of Interests", a detailed review of the health, economic and public policy issues raised by cigarette smoking. Large portions of these broadcasts were devoted to the views of those most strongly urging the health dangers of cigarette smoking.

In addition, of course, the smoking-health issue was and is a continuing subject of numerous reports on news broadcasts by WCBS-TV. Since May 1966, for example, the CBS EVENING NEWS WITH WALTER CRONKITE has included six reports on this issue. In addition, I should also note that WCBS-TV's Science Editor, Earl Ubell, has broadcast, since September 1966, five major reports on the smoking-health issue. As responsible broadcasters, we

have reported and will continue to report this issue fairly and objectively.

It may also be of interest to you to know that in the last few months the American Cancer Society has submitted, pursuant to an Advertising Council approved campaign, and WCBS-TV has broadcast without charge to the Society, five one-minute public service messages which advance the view that cigarette smoking is undesirable.

8 As noted above, WCBS-TV believes that its coverage of the health ramifications of smoking has been fully consistent with the fairness doctrine. In these circumstances, it would appear unnecessary to consider whether the fairness doctrine can properly be applied to commercial announcements solely and clearly aimed at selling products and services—although we do not believe the doctrine is applicable. The value and quality of consumer products and services may often be a matter of dispute. One cannot listen to news broadcasts or read a newspaper today and not be exposed to controversy surrounding such consumer products and services as, for example,—aspirin, soft drinks, beer, automobiles and medical insurance. We believe that it is clear that the fairness doctrine was conceived by the Commission as an aid to the public's right to be informed about public issues—not as a vehicle for giving the Commission power to indirectly regulate product advertising when other governmental agencies are directly charged with the regulatory responsibility over such advertising.

While we do not believe that you are entitled to free time, we appreciate your interest in this matter and are glad to have your views.

Very truly yours,

/s/ CLARK GEORGE

Mr. John F. Banzhaf III
1368 Metropolitan Avenue
New York, New York 10462
December 30, 1966

15

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

June 2, 1967

Television Station WCBS-TV
51 West 52 Street
New York, New York

Gentlemen:

This letter constitutes the Commission's ruling upon the complaint of Mr. John F. Banzhaf, III, against Station WCBS-TV, New York, N. Y. Mr. Banzhaf, by letter dated January 5, 1967, filed a fairness doctrine complaint, asserting that WCBS-TV, after having aired numerous commercial advertisements for cigarette manufacturers, has not afforded him or some other responsible spokesman an opportunity "to present contrasting views on the issue of the benefits and advisability of smoking."

Mr. Banzhaf's letter cites as examples three particular commercials over WCBS-TV which present the point of view that smoking is "socially acceptable and desirable, manly, and a necessary part of a rich full life". Mr. Banzhaf, in his letter to you of December 1, 1966 requested free time be made available to "responsible groups" roughly approximate to that spent on the promotion of "the virtues and values of smoking".

Your responsive letter of December 30, 1966 cites programs which WCBS-TV has broadcast dealing with the effect of smoking on health, beginning in September 1962 and continuing to date. It cites six reports on this issue in its evening news programs since May 1966, five major reports by its Science Editor since September 1966 and five one minute messages, which advance the view that smoking is undesirable, broadcast without charge within the last few months for the American Cancer Society. The letter also refers to half hour and hour programs on smoking and health broadcast in 1962 and 1964. You take the position

that the above programs have provided contrasting viewpoints on this issue by responsible authorities, and therefore, that it is unnecessary to consider whether the "fairness doctrine" may be applied to commercial announcements solely aimed at selling products. You state your view that it may not.

In Mr. Banzhaf's complaint to the Commission, he asserts that the programs cited by you as showing compliance with the "fairness doctrine" are insufficient to offset the effects of paid advertisements broadcast daily for a total of five to ten minutes each broadcast day. He also states that the very point of his letters is to establish the applicability of the doctrine to cigarette advertisements.

16 We hold that the fairness doctrine is applicable to such advertisements. We stress that our holding is limited to this product—cigarettes. Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and Congressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

We reject, however, Mr. Banzhaf's claim that the time to be afforded, "roughly approximate" that devoted to the cigarette commercials. The fairness doctrine does not require "equal time" (see Ruling No. II C. 12, 29 F.R. 10419) and, equally important, a requirement of such "rough approximation" would, we think, be inconsistent with the Congressional direction in this field—the 1965 Cigarette Labeling and Advertising Act. The practical result of any

roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising. But in the 1965 Act Congress made clear that it did not favor such a "drastic" step, but rather wished to afford an opportunity to consider "the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package . . . [on the problem of] adequately alert [ing] the public to the potential hazard from smoking" (Sen. Rept. No. 195, 89th Cong., 1st Sess., p. 5). At the conclusion of a three year period (to end July 1, 1969), and upon the basis of reports from the Federal Trade Commission and the Department of Health, Education, and Welfare (HEW) and other pertinent sources, the Congress would then decide what further remedial action, if any, is appropriate. In the meantime, Congress has promoted extensive smoking education campaigns by appropriating substantial sums for HEW in this area. See P.L. 89-156, Title II, Public Health Service, Chronic Diseases and Health of the Aged.

Our action here, therefore, must be tailored so as to carry out the above Congressional purpose. We believe that it does. It requires a station which carries cigarette commercials to provide a significant amount of time for the other viewpoint, thus implementing the "smoking education campaigns" referred to as a basis for Congressional action in the 1965 Act. See Cigarette Labeling and Advertising Act; remarks of Senator Warren Magnuson, floor manager in the Senate of the bill which became that Act, Cong. Rec. (Daily Edition) Jan. 16, 1967, p. S. 317, 319.

But this requirement will not preclude or curtail presentation by stations of cigarette advertising which they choose to carry.

A station might, for example, reasonably determine that the above noted responsibility would be discharged by pre-

senting each week, in addition to appropriate news reports or other programming dealing with the subject, a number of the public service announcements of the American Cancer Society or HEW in this field. We stress, however, that in this, as in other areas under the fairness doctrine, the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the particular facts of his situation. See Cullman Broadcasting Co., F.C.C. 63-849 (Sept. 18, 1963).

In this case, we note the WCBS-TV is aware of its responsibilities in this area, in light of the programming described in the third paragraph. While we have rejected Mr. Banzhaf's claim of "rough approximation of time", the question remains whether in the circumstances a sufficient amount of time is being allocated each week to cover the viewpoint of the health hazard posed by smoking. We note in this respect that, particularly in light of the recent American Cancer Society announcements, you appear to have a continuing program in this respect. The guidelines in the foregoing discussion are brought to your attention so that in connection with the above continuing program you may make the judgment whether sufficient time is being allocated each week in this area.

BY DIRECTION OF THE COMMISSION

BEN F. WAPLE
Secretary

246

CBS

COLUMBIA BROADCASTING SYSTEM, INC.

51 WEST 52 STREET

NEW YORK, NEW YORK 10019

(212) 765-4321

Leon R. Brooks

Vice President and General Counsel

June 23, 1967

Mr. Ben F. Waple

Secretary

Federal Communications Commission

Washington, D. C. 20554

Dear Mr. Waple:

Reference is made to your letter of June 2, 1967 to television station WCBS-TV setting forth the Commission's ruling upon the complaint of Mr. John F. Banzhaf, III, against that station. In its ruling the Commission holds that the fairness doctrine is applicable to broadcast advertising, but states that its holding is limited to one product—cigarettes. However, the Commission rejects Mr. Banzhaf's claim that time "roughly approximate" to that devoted to cigarette commercials should be devoted to broadcast matter informing the station's audience of what the Commission terms "the other side of this controversial issue of public importance." The Commission concludes by noting that WCBS-TV, in the light of the programming which it has devoted to the effect of smoking on health, is "aware of its responsibilities in this area."

We are appreciative of the Commission's recognition that WCBS-TV is aware of its responsibilities. It is the judgment of this station that the issue of the health hazard involved in the smoking of cigarettes is one which should be called to the attention of the public from time to time. How that is done—whether in news or public affairs programming, by public service announcements prepared by responsible public or private organizations in the health

field, or otherwise, is, of course, a matter solely for the station's judgment. This judgment is not and (in our view) should not be affected by whether or not the fairness doctrine is applicable or whether or not the station carries cigarette commercials.

The Commission has now ruled that all broadcasts of cigarette commercials—no matter what their content—create a *per se* duty to broadcast some proportional amount of other material on the hazards of smoking. We wish to place strongly on the record our view that this ruling is inconsistent with the fundamental objectives of the fairness doctrine. We believe it will severely impair—to the
247 detriment of the public interest—the exercise of licensee judgment in the selection and presentation of programs dealing with controversial issues of public importance. We also believe that it cannot reasonably be restricted to cigarette advertising alone, and that it involves the Commission in an activity—regulation of cigarette advertising—with respect to which Congress had specifically considered and had rejected any new Federal controls.

The Commission's departure in this case from the commonly understood requirements of the fairness doctrine may have resulted in part from an important departure from the procedures which the Commission normally follows in treating fairness issues. The usual procedure is set forth in the Commission's *Fairness Primer** as follows:

"If the Commission determines that the complaint sets forth sufficient facts to warrant further consideration, it will promptly advise the licensee of the complaint and request the licensee's comments on the matter."

This procedural policy of the Commission was cited with approval in *Red Lion Broadcasting Company Inc. v. FCC*, decided on June 13, 1967. But here the Commission did not afford WCBS-TV an opportunity to comment upon the

* FCC Public Notice of July 1, 1964, 29 Fed. Reg. 10415 at 10416.

complaint—or to take action concerning it—prior to its disposition of the matter. While it is true that WCBS-TV had replied directly to Mr. Banzhaf and that Mr. Banzhaf in turn had forwarded a copy of that letter to the Commission, it is noteworthy that the letter in question did not set forth, except in passing, the comments of the station with respect to the application of the fairness doctrine to product advertising. Indeed, the station, after describing the programming which it had already presented on the smoking health issue, observed:

“In these circumstances, it would appear unnecessary to consider whether the fairness doctrine can properly be applied to commercial announcements solely and clearly aimed at selling products and services—although we do not believe that the doctrine is applicable.”

Thus the Commission did not have WCBS-TV’s considered comments—or those of any other broadcast licensee—on this important issue before making its
248 far reaching decision. We respectfully request, therefore, that the contents of this letter be treated by the Commission as our comments on the complaint filed by Mr. Banzhaf, and that the Commission reconsider its ruling on the basis of these comments.

Turning to the merits of the Commission’s ruling, we believe that it is fundamentally inconsistent with the fairness doctrine. That doctrine—which was first enunciated in its present form in the context of editorializing by broadcast licensees—is supposed to further the goal of affording “reasonable opportunity for the discussion of conflicting views on issues of public importance.”* One may search the Commission’s 1949 *Report on Editorializing by Broadcast Licensees* in vain for any indication that the doctrine was then viewed as encompassing routine product adver-

* Section 315, Communications Act, as amended.

tising. Similarly, when the Commission issued its *Fairness Primer* in 1964 neither the introductory text, nor the 28 explanatory rulings, nor the legislative history of the fairness doctrine set forth as Appendix B thereof, made any reference to product advertising. When in 1965 the Commission furnished the Senate Committee on Commerce with its comments on the proposed legislation to regulate the advertising and labeling of cigarettes, it seems evident that the Commission did not then have in mind any applicability of the fairness doctrine to advertising in general or cigarette advertising in particular. The Commission informed the Committee, in pertinent part:

“The Federal Communications Commission’s interest in this matter is necessarily limited to the use of broadcast media for cigarette advertising. It seems clearly appropriate, however, that the matter of cigarette advertising be treated on an all-inclusive, across-the-board basis, rather than in a piecemeal fashion. Since the Federal Trade Commission has undertaken to deal comprehensively with the remedial action needed to protect the public in the light of the report on smoking and health, issued January 11, 1964, by the Advisory Committee to the Surgeon General, the Federal Communications Commission has not held proceedings, or undertaken studies, to evaluate the various factors and considerations in this area. While we believe that
 249 some action on an overall basis is appropriate, we are thus not in a position to make recommendations to the Congress in this field, and specifically, as to whether S. 547 or S. 559 should be enacted.” *

Following adoption of the Cigarette Labeling and Advertising Act of 1965, the Commission maintained its long silence on the subject and we are not aware that, from the date of the Commission’s comments to the Senate Com-

* Sen. Rept. No. 195, 89th Cong., 1st Sess., page 13. S. 547 would have required each cigarette advertisement, as well as each cigarette package, to include the warning, “Caution—Habitual Smoking Is Injurious to Health.”

merce Committee to the present, it has held any proceedings or undertaken any studies of the matter, apart from its consideration of the exchange of correspondence between Mr. Banzhaf and WCBS-TV.

Mr. Banzhaf's letter "cites as examples three particular commercials" and these are the commercials on which the Commission ruled. It is not clear that the Commission had before it these actual commercials, since it did not request copies or transcripts from WCBS-TV. It may or may not be possible for a cigarette commercial which meets all currently applicable legal requirements to place in question the issue of smoking and health. The commercials here involved, however, did not do so.*

The Commission, in any event, appears to have based its ruling on the assumption that *all* cigarette commercials (whatever their content) raise the health issue. But the hazard involved in cigarette smoking is not, we submit, an issue necessarily raised by a cigarette commercial aimed only at promoting the use of a particular cigarette as "attractive and enjoyable."

250 While the Commission 19 years ago expressed a similar doctrine with respect to liquor advertising**

* Station WCBS-TV conforms to the NAB Television Code which provides that cigarette advertising "shall not state or imply claims regarding health . . ." Each of the CBS owned radio and television stations subscribes to the appropriate NAB Code, which contains essentially parallel provisions with respect to cigarette advertising.

** In considering a complaint that a station, though carrying liquor advertising, had refused to sell time counselling abstinence from drinking, the Commission said: "What is for other individuals merely a routine 'plug' extolling the virtues of a beverage, essentially no different from other types of product advertising, is for these individuals the advocacy of a practice which they deem to be detrimental to our society. Whatever the merits of this controversy, which it is not our function to resolve, it is at least clear that it may assume the proportions of a controversial issue of public importance." *In re Petition of Sam Morris*, 3 RR 154, 156 (1948). In the *Sam Morris* case, the Commission drew particular attention to the fact that in over 40% of the station's service area, county laws forbade the sale of alcoholic beverages. There are, of course, no laws in WCBS-TV's service area forbidding the sale of cigarettes.

its silence since that time is notable. Indeed, during that period the Commission, in interpreting the fairness doctrine, has found occasion to sharply distinguish between the explicit and implicit raising of controversial issues in broadcast material. Thus, with respect to the claim of atheists and agnostics that the broadcast of church services should be regarded as advocating one side of a controversial public issue, the Commission has recognized that, while an explicit attack on atheists or agnostics might give rise to an obligation under the fairness doctrine, the mere broadcast of church services, devotionals or prayers does not do so.

"The Commission has long held that mere carrying of a religious broadcast does not, in and of itself, mean that one side of a "controversial issue of public importance" was presented . . . The contrary position urged in effect by complainant—that every devotional service, per se, is presentation by the licensee of a viewpoint on a controversial issue—is, I think, patently unreasonable." *Letter to Madalyn Murray*, 5 RR 2nd 263 at 266, 267 (1965) [Concurring opinion of Chairman E. William Henry in which Commissioner Kenneth A. Cox joins.]. See also *Letter to Edward J. Heffron*, 3 RR 264a (1948), *Letter to Robert H. Scott*, 25 RR 349 (1962).

251 To treat any and all cigarette advertisements, without exception, as raising a controversial issue, and to require some proportional amount of other program material, will have practical results which can only debase and distort the fairness doctrine. Efforts to sell a product are by nature repetitive and continuous. Treating all such efforts as discussions of one side of a controversial issue immediately raises the question of whether any one program, or program series—however enlightening and informative as to all points of view—can constitute an adequate opportunity for response. The Commission has reacted to this difficulty by suggesting that stations which carry ciga-

rette advertising must devote a significant amount of time each and every week to the views of those who oppose cigarette smoking.

Such a requirement makes no sense in the context of news and public affairs programming, where the amount of time used, the number of programs presented and the frequency of scheduling depends upon the licensee's responsible journalistic judgment. Inevitably, the only recourse must be spot announcements, and the Commission suggests as much when it indicates that a station may discharge its responsibility "by presenting each week, in addition to appropriate news reports or other programming dealing with the subject, a number of public service announcements of the American Cancer Society or HEW in this field."

Broadcast treatment of the cigarette health issue should not be reduced to a contest of opposing spot announcements, endlessly repeating the message long after any member of the public has been able to understand and act on it if he wishes. This is the first time that the Commission has held that the fairness doctrine requires that the public be propagandized even after it has been enlightened. In short, the result of analogizing product advertisement to the "discussion" comprehended by the fairness doctrine is to convert the responsibility to discuss both sides of controversial issues into presentations very similar to product advertising.

The Banzhaf ruling does not merely conflict with the fairness doctrine objective of encouraging a meaningful discussion of controversial public issues. It also severely impairs the exercise of licensee judgment in the selection and presentation of programs dealing with such issues. As the Commission has stated in its *Fairness Primer*, and has repeatedly emphasized, the doctrine calls upon the licensee "to make reasonable judgments in good faith on the facts in each situation—as to whether a controversial issue of

252 public importance is involved, and as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints and all of the other facets of such programming." Furthermore, "In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions"

Now, however, Commission fiat is substituted for licensee judgment. There must be balancing programming "each week," and the Commission even suggests just what programming will suffice to achieve this balancing, namely public service announcements of another governmental agency, HEW, or of the American Cancer Society. In this connection we would point out that in the recently decided *Red Lion* case the court, in finding that the fairness doctrine does not affront the First Amendment, stated:

"Moreover, petitioners are not furnished with a mandatory program format, nor does the Doctrine define which, if any, controversial issues are to be the subject of broadcasting. The latitude of petitioners' operation of their station insofar as programming is concerned is limited only by petitioners' discretion and good faith judgment."

We respectfully suggest that the Commission has departed from its traditional case-by-case approach to fairness issues. A "per se" approach to fairness matters—such as an arbitrary rule that all cigarette commercials must be balanced by some proportional amount of other program material dealing with the health hazards of cigarette smoking—is bound to result in inequities and create extraordinary operating dilemmas for broadcasters, and resulting administrative dilemmas for the Commission.

Some of the difficult questions that are bound to arise are listed below:

a) How is a proper ratio to be struck between minutes of cigarette commercials and minutes of other program material on cigarette smoking? While the Commission has said that no "equal time" principle is applicable, it has suggested that other program material be broadcast "weekly." Already newspapers and trade publications have carried informal interviews with Commission personnel intimating that certain ratios, such as 3 minutes of commercials to one minute of other material, would be proper. But any such ratios are bound to be arbitrary and unsatisfactory.

253 Since the Commission appears to believe that the repetition inherent in cigarette commercials affects the degree to which they "advocate" smoking, it would follow that the repetitive effect of other program material would have a similar effect on the degree to which they advocate not smoking. But the content of a program or commercial is at least as important in measuring its advocacy on a controversial issue as its length or frequency. It is going to be impossible for stations or for the Commission to strike any kind of satisfactory balance by counting frequency or minutes.

b) If a station decides to limit the number of cigarette commercials it carries, how are choices to be made among the various competing brands?

c) If the Commission's ruling stands, the impact of smoking on health will become the most significant public issue on which broadcasters will regularly be presenting broadcast material. It need hardly be suggested that, important as the issue is, it does not deserve this degree of prominence. In the health field alone, there are numerous issues equally as important. Many other national and international issues vie for

and receive attention from conscientious broadcast licensees. Their allocation of time to the broad range of important public issues will suffer if their acceptance of product advertising is held to impose a strait-jacket on their freedom of selection of controversial issues.

d) Should a station discharge its responsibilities by carrying "canned" public service announcements prepared by others, dealing with the hazards of smoking, or should it exercise its own independent judgment by preparing its own materials analyzing all sides of the problem? Would a program setting forth both the scientific evidence tending to support the existence of a health hazard, together with a discussion of the
 254 gaps and weaknesses in such evidence and of the benefits people believe they derive from smoking, be unacceptable because it is too balanced to offset the effects of cigarette commercials? The Commission's suggestion that stations should carry HEW and American Cancer Society announcements comes very close to prescribing the content of licensee programs* and may induce many stations to play safe by doing what the Commission wants. Any such loss of licensee independence in presenting controversial issues would be most regrettable.

e) If the Commission's ruling stands it cannot be limited to cigarettes alone and the foregoing consequences can only be exacerbated. There is no valid logical reason for such limitation. It cannot be grounded on the existence of Congressional findings as to the element of hazard in use of the product, because such findings have been made in other cases—notably

* Indeed, a prime justification given by the Commission for the ruling and its suggestion that HEW announcements be carried is that its action "must be tailored so as to carry out" a Congressional decision to appropriate funds to support HEW's extensive smoking education campaigns.

and most recently automobiles. There would, further, appear to be no valid distinction in logic between products that are the object of explicit Congressional action and products that are regulated by administrative agencies under a Congressional delegation of authority. Indeed, in *Sam Morris*, supra, the Commission felt that the deeply held convictions of a significant number of persons in a given area could make a "routine advertising 'plug'" a cause of controversy. Thus, it is not overly speculative to anticipate an extension of the Commission's ruling, if it be allowed to stand in its present form, to automobiles, food and drug products, insurance, mutual funds—conceivably even children's toys. This further extension could only magnify the consequences that we have previously seen must follow in terms of distortion of licensee judgment and overburdening of licensees' ability to choose among the topics and issues to which they will allot public service time.

255 The Commission's letter also refers to the Cigarette Labeling and Advertising Act of 1965. Since Congress there reserved to itself the determination of what further restrictions on cigarette advertising would be proper, it appears to us that the Commission is, through an unwarranted extension of the fairness doctrine, injecting itself into an inappropriate area.

With the adoption of the Federal Cigarette Labeling and Advertising Act of 1965 the Congress made its finding that cigarette smoking may be hazardous to health and required the cautionary legend on every pack of cigarettes. The Congress further, as the Commission's ruling notes, considered requiring the inclusion of a warning of potential hazards to health in all advertising of cigarettes, but such requirement was not included in the reported bill because it was felt that "at the present time the necessity for, and the effectiveness of, this requirement has not been demon-

strated." As we have already pointed out the Commission itself stated to the Congress that it was "not in a position to make recommendations to the Congress in this field." Although it did note that any treatment of cigarette advertising should be accomplished on an "across-the-board basis, rather than in a piecemeal fashion."

The Congress recognized that it would be inconsistent with the objectives of the Act for manufacturers to be permitted to make advertising claims, or conduct advertising campaigns, which would tend to undermine the effectiveness of the cautionary statement on the package, and the committee reports specifically enjoin the Federal Trade Commission to treat as false and misleading, and an unfair or deceptive act or practice within the meaning of Section 5 of the Federal Trade Commission Act, "any advertising which tends to negate the warning which must be placed on the package . . . " *

During the period in which the Federal Trade Commission is prevented by the terms of the Labeling Act from requiring a health statement in cigarette advertising (and all other Federal, State and local agencies are denied authority to do so by a clear statement of "preemption") the Federal Trade Commission is continuing to monitor current practices and methods of cigarette advertising and promotion, and has stated that it will take "all appropriate action consistent with that Act (The Labeling Act) to prohibit cigarette advertising that violates the Federal Trade Commission Act." **

The Commission's ruling omits any mention of this aspect of the Congressional action, which delineates the problem raised by Mr. Banzhaf's complaint in a considerably

* H. Rep. 449, 89th Cong., 1st Sess., p. 5; see also, S. Rep. 195, 89th Cong., 1st Sess., p. 6.

** Federal Trade Commission, Order, "Vacation of Warning Requirements in Trade Regulation Rule Concerning Advertising and Labeling of Cigarettes," 30 Fed. Reg. 9484-9485 (1965).

different light. If the commercials of which Mr. Banzhaf complains, or cigarette commercials per se, violate the strictures expressed by the Congress and the Federal Trade Commission then a serious question of an entirely different nature might be presented, but we do not believe that the commercial announcements broadcast by WCBS-TV are defective in this manner.

In view of the express concern of the Congress with the possibility that advertising for cigarettes could be so conducted as to undermine the effectiveness of the cigarette package warning label, and in view of the Congress' adoption of specific measures to meet this concern, it is reasonable to think that had the Congress wished more to be done in this area, by way of educational campaigns or otherwise, the legislative history would so indicate.

We are not clear whether the Commission's letter to WCBS-TV is intended to represent any kind of order with respect to the licensee's programming. The letter concludes that "the question remains whether in the circumstances a sufficient amount of time is being allocated each week to cover the viewpoint of the health hazard posed by smoking." It then states that in the light of the letter the licensee "may make the judgment whether sufficient time is being allocated each week in this area."

For the reasons set forth above, it is our opinion as licensee that we are fully and responsibly discharging our obligation to present both sides of controversial issues, including the health hazard posed by cigarette smoking. We further believe that our performance in discharging this obligation must be measured primarily by the content of our programs, and not by any arbitrary counting of minutes, measure of frequency, or any similar standard. We see no need for changing our present policy and do not interpret your letter as an order, demand or suggestion that we do so.

257 We believe that the question of whether a licensee is responsibly complying with the fairness doctrine cannot be resolved by per se guidelines, ratios or other rigid rules, and that any effort to do so would raise serious constitutional as well as practical issues. We believe such questions can only be resolved on a case-by-case basis after a detailed analysis of the licensee's performance. We believe that the performance of WCBS-TV as to cigarette smoking, as well as other controversial issues, will withstand such an examination.

Very truly yours,

/s/ LEON R. BROOKS
Leon R. Brooks

403 **Petition for Reconsideration of National Broadcasting Company, Inc.**

• • • • •
407 NBC has attached hereto the texts of three cigarette advertisements, two (Attachments A and B hereto) which appear to be mentioned in Mr. Banzhaf's letter to Television Station WCBS-TV of December 1, 1966, and one (Attachment C) which is probably the remaining advertisement mentioned in that letter.

The entire text of one advertisement is

"Come to where the flavor is—
Come to Marlboro Country" (Attachment A).

As will be seen from an examination of the other two, they discuss such specific matters as the flavor, length, filter and packaging of the particular cigarette.

Not one discusses the issue of public importance which is admittedly controversial: whether smoking is or is not a hazard to the smoker's health. Had the actual texts of the

commercial advertisements been before the Commission, it would have been able to see that the issue of whether smoking may be a hazard to health was *not discussed at all*. Certainly it would have to find that a licensee could not be charged with acting unreasonably and in bad faith if he concluded that this issue was not discussed.

408 The visual portion of the advertisements is also described in the attachments. The film itself could be made available if the Commission wished to view it. However, the visual portion of these advertisements does not discuss whether smoking is or is not a hazard to the smoker's health. They may show "attractive" people "enjoying" themselves while smoking cigarettes, but surely that does not constitute the expression of a viewpoint on whether smoking is a hazard to the smoker's health. Again, a licensee who concludes that the visual portion does not discuss the issue of whether smoking is a hazard to the smoker's health, cannot be accused of acting unreasonably or in bad faith.

• • • • • • • •

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ATTACHMENT A

Leo Burnett Company, Inc.

PHILIP MORRIS, INC.

60-Second Film

"Evening Forest"

Marlboro

Philip Morris-C-1991-MARL-60 (Color)

Client Approved: 8/17/66 ab

VIDEO

AUDIO

1	Open on rays of late sun coming through trees.	Music: Foggy Morning-Type.
2	Diss to long shot: Rays through trees. A rider appears.	Continues
3	Diss to closer shot. As rider rides into clearing.	Continues
4	Move to closer shot as he reaches into saddle bag, for carton.	Continues
5	Move to close up "Marlboro" on carton.	Continues
6	Diss. to new angle on word "Marlboro"	Continues.
7	Pull back to reveal actor lighting up. Smoking.	Continues.
8	Hand with pack drops to saddle horn. Hand with smoke comes in.	Continues.
9	Diss. to cu: Actor. Smoking.	Continues.
0	Long Diss. (Superimposition effect) new angle, actor.	Continues.
1	Pull back to reveal actor, now at campfire.	Continues.
2	Tilt up to reveal sunset. Super: "Come to—" with anner.	Music: Under anner. Anner: Come to where the flavor is— Come to—
3	Super: "Marlboro Country" with anner.	Music: Continues under. Anner: . . . Marlboro Country! Music: Up. Theme.
4	Match diss. to "Marl" on pack and pull back to reveal pack by campfire.	

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ATTACHMENT B

Leo Burnett Company, Inc.

PHILIP MORRIS, INC.

60-Second Film

"Roundup"

Marlboro

Philip Morris-C-2094-Marl-60

Client Approved: 9/7/66 rs

Revision #1: 9/15/66 rs

VIDEO

AUDIO

- | | | |
|-----|---|---|
| 1 | Open on LS: Horizon almost abstract. | Music: Up. |
| 2 | Diss to closer horizon shot.
Cloud of dust. | Continue — Louder. |
| 3 | Diss to closer shot cloud of
dust larger. | Music: (Out) |
| | | Anner: (In clear) This is Marlboro
Country! |
| 4 | Out dramatically "inside" herd
of cattle. | Music: (Mag 7 up). |
| 5 | Cut to cu: Marlboro man giving
directions to hands. | Continues. |
| 6 | Move to closer shot as man brings
pack to mouth, takes cigarette.
Follow pack down to saddle. | Continues. |
| 7 | Strikes match on saddle horn.
Cam follows match up. | Continues. |
| 8 | Hold on light up. | Continues. |
| 9 | Diss to wider angle, as foreman
(Marlboro man) smokes, gives
directions to cow hands in BG. | Continues. |
| 10 | Diss to new angle LS: cattle drive. | Under Anner. |
| | | Anner: The panhandle—a lot a country. |
| 11 | Diss back to foreman. | Right now it's filled with cattle . . .
three thousand |
| 12 | Diss to LS: cattle drive and
"country". | head of them. Movin' through
Marlboro Country! |
| 13 | Diss in and hold (creating super-
imposition) ECU: foreman smoking. | Music: (Segues into singer accompaniment) |
| 418 | | Singers: <i>You get a lot to like with a
Marlboro . . .</i> |
| 14 | Diss out BG. Hold, ECU foreman.
Pull back to reveal foreman now at
pens. The drive's over. | Singers: <i>filter . . . flavor . . . pack or box.</i> |
| 15 | Cut to new angle. He turns away,
starts toward chuckwagon in BG,
where his hands are already eating.
Super: Come to where the flavor is. | Anner: Come to where the flavor is— |
| 16 | Hold as he walks toward wagon.
Super: Marlboro Country. | Come to Marlboro Country. |

Sullivan, Stauffer, Colwell & Bayles, Inc.
575 Lexington Avenue * New York 10022

ATTACHMENT C

TV-RADIO

Client: The American Tobacco Co.
Product: Pall Mall Gold
Program:

Date: 60 sec. TV commercial
Network: "The Bet" at P/F-T-30
Description: As Filmed

- | | |
|--|---|
| 1. Open on informal party in basement of suburban home. There's a billiard table, FG. | (Conversation, dinnerware sounds, sound of pool cue hitting ball) |
| 2. Follow ball as it caroms off table bumper. | (Natural sound) |
| 3. Pan up from table to group of men and women in center of which heated discussion is going on. | Man #1: Bet it is! |
| 4. Push into crowd, discover two men arguing. | Man #2: Bet it isn't. |
| 5. Cut to man #1, as he reaches into an inside pocket. | Man #1: You're on! I bet |
| 6. He produces his Pall Mall cigarette. | my cigarette is longer than yours. |
| 7. He takes a dark-tipped, normal length cigarette from man #2. | Look, yours . . . |
| 8. He moves his Pall Mall filter tipped up next to other man's in comparison. Pall Mall is obviously longer. | Mine! |
| 9. Man #1 holds pose with two cigarettes as man #2 looks at them, surprised. | Man #2: Hey! Yours is longer! What is it? |
| 10. Man #1 produces pack of Pall Mall Gold. | Man #1: Filter Tipped Pell Mell.
Man #2: Nice pack. Gold. |
| 11. Cut cu package. | Man #2: (V.O.) Same Pell Mell tobacco! |
| 12. Return two-shot as first man offers second man a Pall Mall. | Man #1: (O.C.) Identical |
| 13. Cut to ruler and cigarette. Man's finger sweeps along tobacco portion, stops at filter. | Anner: (V.O.) Yes, you get the finest quality money can buy. That same famous length of the same identical Pell Mell tobaccos . . . |
| 14. Finger points to filter tip. | —and a filter tip. |
| 15. Lose ruler. Diss to cigarette in man #2's hand. It is lighted he has taken a puff. | Man #2: (O.V.) Tastes good . . . and mild. I like! |
| 16. Cut to man's hand, cu, passing Pall Mall pack to woman's hand, in rhythm with jingle. | (Begin Music)
Jingle Singers: (V.O.) I know what I like. |

17. Cut woman's face cu, as she takes out a cigarette.
18. Cue cu pkg as it is passed to man's hand.
19. Cut to man's face as he holds up Pall Mall in "length" gesture.
20. Cut cu his face.
21. Cut cu pack, being passed back to woman's hand.
22. Cut to woman with lighted Pall Mall.
23. Cut to pack again, in rhythm.
24. Move back to discover it in woman's hand, next to billiard table.
25. Move to pack as she puts it down on billiard table top.
26. Cut to tight shot of pack. Super in sync, "outstanding . . ." "and they are *mild*!"

and I like the taste.

of Pell Mell Gold!

That luxury length . . .

Man: (O.C., Spoken) I like!

Jingle Singers: (V.O.) That Pell Mell taste . . .

Woman: (O.C.) I like!

Jingle Singers: (V.O.) Yes, Pell Mell Gold! (Red Jingle)

Woman: (O.C.) I know what I like and I like Pell Mell!

Anner: (V.O.) Discover the *long* filter cigarette that's long on flavor.

Filter Tipped Pell Mell. Packaged in gold. Outstanding . . . and they are *mild*!

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

RM-1170

In the Matter of
Television Station WCBS-TV New York, New York
Applicability of the Fairness Doctrine
to Cigarette Advertising

Memorandum Opinion and Order

Adopted September 8, 1967; Released September 13, 1967

By the Commission: Commissioners Loevinger and Johnson concurring and issuing statements; Commissioner Wadsworth absent.

1. The Commission has before it for consideration: a "Petition for Rulemaking" and a "Petition for Stay of Effectiveness of Application of Fairness Doctrine to Cigarette Advertising," filed on June 20, 1967 by the law firm of Smith, Pepper, Shack and L'Heureux on behalf of various broadcast clients; a letter, dated June 23, 1967, from Columbia Broadcasting System, Inc. (CBS), requesting reconsideration of a ruling in the Commission's letter of June 2, 1967 to television station WCBS-TV; a "Petition for Reconsideration" and a "Petition for Immediate Stay of Effectiveness Pending Reconsideration by the Commission," filed on July 3, 1967 by the National Association of Broadcasters (NAB); a letter from Association of National Advertisers, Inc., dated June 29, 1967, requesting reconsideration of the ruling; petitions for reconsideration, incorporating requests for stay, filed by The Tobacco Institute, Inc., *et al.* and WGN Continental Broadcasting Co., *et al.* on June 30, 1967 and July 3, 1967,

respectively; and petitions or requests for reconsideration filed on July 3 and 5, 1967 by American Broadcasting Companies, Inc. (ABC), National Broadcasting Company, Inc. (NBC), Storer Broadcasting Company, Griffin-Leake TV, Inc., *et al.*, the law firm of Dow, Lohnes and Albertson on behalf of 17 broadcast licensees, and the law firm of Pierson, Ball & Dowd on behalf of the licensees of 61 radio and television stations. A petition for reconsideration was filed on August 1, 1967 by the Maryland/District of Columbia/Delaware Broadcasters' Association; and a "Statement of Position by Federal Communications Bar Association" on July 27, 1967.¹ Requests for reconsideration have also been received from several Congressional sources.

815 A pleading in support of the Commission's ruling has been filed by the complainant, John F. Banzhaf III; his pleading challenges the standing of the petitioners and many of the arguments advanced, and urges denial of the relief sought.² Petitioners seek rule making on, and reconsideration and rescission of, a ruling in the Commission's letter of June 2, 1967 to television Station WCBS-TV, New York City, that the Fairness Doctrine is applicable to cigarette advertising (FCC 67-641), and a stay of the effectiveness of the ruling pending action on their petitions.

2. Our ruling (FCC 67-641) was made on a complaint against Station WCBS-TV, New York, by Mr. John F. Banzhaf III, who asserted that this station, after having aired numerous commercial advertisements for cigarette manufacturers, had not afforded him or some other responsible spokesman an opportunity "to present contrasting views on the issue of the benefits and advisability of smoking." Specifically, he noted three cigarette advertisements broadcast on November 24, 1966 over WCBS-TV

¹ In addition, the Commission has received various resolutions from state associations of broadcasters and numerous letters from the public.

² We do not find the arguments raised as to petitioners' standing persuasive.

which presented smoking as "socially acceptable and desirable, manly, and a necessary part of a rich full life." Attached to the complaint was a letter by Mr. Banzhaf to the station requesting that free time be made available to "responsible groups" roughly approximate to that spent on the promotion of the "virtues and values of smoking." There was also attached a reply to Mr. Banzhaf by WCBS-TV setting forth the programs which it had broadcast on the effect of smoking on health, taking the position that these programs provided contrasting viewpoints on this issue, and stating its view that the Fairness Doctrine may be inapplicable to commercial announcements solely aimed at selling products. In Mr. Banzhaf's complaint, he asserted that the WCBS-TV showing of compliance with the Fairness Doctrine was insufficient to offset the effects of advertisements broadcast daily for a total of five to ten minutes each broadcast day.

3. The Commission ruled that the Fairness Doctrine is applicable to cigarette advertisements, but rejected Mr. Banzhaf's claim that the time to be afforded roughly approximate that devoted to cigarette commercials. We held that a station which carries commercials promoting the use of a particular cigarette as attractive and enjoyable is required to provide a significant amount of time to the other side of this controversial issue of public importance—i.e., that however enjoyable, such smoking may be a hazard to the smoker's health. We stated that here, as in other areas under the Fairness Doctrine, the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the facts of his situation; and that accordingly the initial judgment as to whether sufficient time is being allocated each week in this area by WCBS-TV is one for the licensee.

816 4. By a letter to the Commission dated June 23, 1967, CBS requests that the contents of its letter be treated as the comments of WCBS-TV on the complaint

and that the Commission reconsider its ruling on the basis of these comments. CBS does not request a stay of the effectiveness of the ruling, but does challenge the merits of the ruling.

5. In support of their requests for relief, other petitioners urge that the ruling has broad implications and will affect all licensees carrying cigarette advertising though they did not have an opportunity to be heard prior to its adoption. It is asserted that substantial doubts as to the validity of the ruling are presented by the various requests for reconsideration and other relief, and that licensees will not dare risk non-compliance pending action on these pleadings lest their non-compliance be raised at license renewal time. It is further asserted that licensees would suffer irreparable damage in the interim by temporarily adhering to the ruling because they would risk loss of substantial amounts of advertising revenue and compliance would disrupt station advertising policies as well as give rise to scheduling and production problems. Consequently, petitioners state, fairness and an equitable administration of the Fairness Doctrine call for a suspension of the effectiveness of the ruling pending action on the petitions for reconsideration and rule making.

6. We agree that the ruling constitutes a precedent on an important issue which will affect licensees other than WCBS-TV and may necessitate a change in the operations of some. In view of the widespread interest in the ruling by persons who have not hitherto been heard, and since stay relief has been requested, we have decided to give expeditious consideration to the arguments made in all of the pleadings before us to determine whether anything has been advanced on the merits which would warrant reconsideration of our ruling, a stay of its effectiveness, or rule making in this area. The positions of the parties appear to be amply set forth in the pleadings on file, and we have given thorough consideration to the arguments made in reaching our decision. For the reasons set forth below,

it is the conclusion of this Commission that nothing has been advanced which would warrant reconsideration or a stay of our ruling or rule making. However, in the circumstances, we have decided for reasons of equity that the conduct of licensees (including WCBS-TV) in applying the Fairness Doctrine to cigarette advertising prior to the publication date of this Memorandum Opinion and Order (which we shall also mail to all broadcast licensees)

817 will not be considered in connection with their applications for renewal of license; conduct subsequent to that date will receive consideration, in specific rulings where appropriate or at license renewal time.

I. PETITIONERS' ARGUMENTS ON THE MERITS

7. The principal contentions presented on the merits of the ruling are: (A) that the Fairness Doctrine is itself violative of the First and Fifth Amendments to the United States Constitution and hence cannot properly serve as a basis for delineating licensee responsibilities under the Communications Act; (B) that the Fairness Doctrine, even if constitutional, applies only to programming in the nature of news, commentary on public issues or editorial opinion, and does not extend to advertising; (C) that the Commission is precluded from applying the Fairness Doctrine to cigarette advertising because Congress has preempted the field and the Commission's ruling is contrary to Congressional policy; (D) that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission has invalidly made a blanket ruling that any cigarette advertisement *per se* presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose; (E) that the requirement that a significant amount of time be allocated each week to cover the viewpoint of the health

hazard posed by smoking and the suggestion that a licensee might, *inter alia*, present a number of public service announcements of the American Cancer Society or the Department of Health, Education and Welfare, will cause a debasement of the Fairness Doctrine generally and substitute Commission fiat for licensee judgment; (F) that the ruling cannot logically be limited to cigarette advertising alone; (G) that the ruling will have an adverse financial effect upon broadcast licensees by causing the cigarette industry to turn to other advertising media and will also have an adverse effect on the sale of cigarettes; and (H) that the ruling is in any event procedurally invalid for failure to accord interested persons an opportunity to be heard prior to the issuance of a novel and unprecedented policy determination. We shall carefully examine each of these contentions below and set forth in full our reasons for concluding that they lack merit.

A. Constitutionality of Fairness Doctrine

8. Those parties claiming that the Fairness Doctrine is violative of the First and Fifth Amendments to
 S18 the Constitution incorporate by reference their comments to this effect in Docket No. 16574, *In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates*.³ By a Memorandum Opinion and Order released on July 10, 1967 in that docket (FCC 67-795), the Commission rejected the contention as to the First Amendment. For the reasons and authorities there set forth, we adhere to that deter-

³ This contention is made by the NAB, the law firm of Pierson, Ball and Dowd, and WGN Continental Broadcasting Co., et al. The petition for rule making filed by Smith & Pepper states that it does not address itself to the question of whether *Red Lion Broadcasting Co. v. Federal Communications Commission*, Case No. 19,938 (C.A.D.C., June 13, 1967), is good law.

mination here.⁴ The Fifth Amendment challenge was also rejected in *Red Lion Broadcasting Co. v. Federal Communications Commission*, Case No. 19,938 (C.A.D.C., decided June 13, 1967), and we see no valid distinction in the circumstances of this matter.⁵

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B. Scope of Fairness Doctrine

9. In contending that the Fairness Doctrine does not apply to advertising, the parties argue that the doctrine had its genesis in the 1949 *Report of the Commission in the Matter of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, which was meant to apply only to dissemination of news, commentary on public issues, and editorial opinion because it contains no reference to advertising. It is further urged that no mention of advertising was made in the 1964 Fairness Primer, 29 F.R. 10415, and that the Commission has never interpreted the doctrine as applying to advertising. In addition, it is asserted that Congress, in giving specific approval to the Fairness Doctrine as a basic delineation of a standard of public interest in broadcasting in the 1959 amendment of Section 315(a) of the Communications Act, 73 Stat. 557, 47 U.S.C. 315(a), limited the scope of the doctrine to programming of that nature since it

⁴ Since advertising, although not wholly beyond the First Amendment, enjoys less protection than other speech (see *Murdock v. Pennsylvania*, 319 U.S. 105, 110-111; *Valentine v. Chrestenson*, 316 U.S. 52, 54; *Martin v. Struthers*, 319 U.S. 141, 142, note 1; *Beard v. Alexandria*, 341 U.S. 622, 641-643), the Commission's power to regulate advertising by radio may, indeed, be broader than it is with respect to programming. See *Head v. Board of Examiners*, 374 U.S. 424, 430-431, 437-441 (advertising), and cf. *Farmers Union v. WDAY*, 360 U.S. 525, 529-530 (political broadcasts); *Henry v. Federal Communications Commission*, 302 F. 2d 191, 194 (C.A.D.C.), cert. den. 371 U.S. 821 (entertainment).

⁵ Insofar as it is asserted that due process has not been accorded, we believe that our extensive consideration of the pleadings filed since the ruling meets the requirements of due process in view of the nature of the issue and the arguments relating thereto (see paras. 55-58, *infra*). The conduct of licensees prior to the publication of this Memorandum Opinion and Order will not be considered adversely when the question of renewal of license arises.

did not amend Section 317 of the Act to incorporate a similar provision. It follows, the parties state, that the present ruling is an unprecedented extension of the Fairness Doctrine which is beyond the Commission's discretion or statutory authority.

10. We do not find these arguments persuasive. The Fairness Doctrine has its foundation in the obligation imposed on licensees by the Communications Act to operate in the public interest (see discussion, *infra*, par. 64), which includes the "basic policy of the 'standard of fairness'" and the "broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy." H. Rept. No. 1069, 86th Cong., 1st Sess., p. 5; S. Rept. No. 562, 86th Cong., 1st Sess., p. 13; Section 315(a); 1949 Report on Editorializing, 13 F.C.C. 1246, 1248-1249. That "one of the basic elements of any such operation" (13 F.C.C. at 1248) is a recognition by the licensee of "the right of the public to be informed" (13 F.C.C. at 1249) as to "opposing positions on the public issues of interest and importance in the community" (13 F.C.C. at 1258) when the licensee is presenting programming in the nature of news, commentary on public issues or editorial opinion, does not mean that the licensee is relieved of his statutory responsibility for advertising broadcast over his facilities or his over-all duty to operate in the public interest and to make a fair presentation of controversial issues of public importance in whatever context they may arise. Section 315(a); 1949 *Report on Editorializing*, 13 F.C.C. at 1257-1258. Moreover, the circumstance that Congress specifically incorporated in the Fairness Doctrine into the 1959 amendment to Section 315 to make it "crystal clear" that the programming exemptions from the equal time requirement of that section
 820 did not exempt licensees "from objective presentation thereof in the public interest" does "not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's

statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and matters of public controversy." S. Rept. No. 562, 86th Cong., 1st Sess., p. 13; 105 Cong. Rec. 14439.⁶ Most important, the amendment refers to the obligation imposed upon broadcast licensees "... *under this Act* to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (emphasis supplied).

11. The Commission's present ruling that advertising falls within the public interest responsibilities of a licensee is not a novel or unprecedented policy determination. See concurring opinion of Mr. Justice Brennan in *Head v. Board of Examiners*, 374 U.S. 424, 437-441. This opinion sets out in detail the administrative and other pertinent history establishing the pattern of Commission regulation in this area. See par. 13, *infra*.

12. The Commission has always directed itself particularly to programming and advertising which bears upon public health and safety. The Federal Radio Commission denied a renewal of license to a station which broadcast a "medical question box" devoted to diagnosing and prescribing treatment of illnesses from symptoms given
821 in letters from listeners, and which received a rebate on each prescription sold. *KFKB Broadcasting Association v. Federal Radio Commission*, 47 F. 2d 670, 671 (C.A.D.C.). The Radio Commission held, with judicial approval, that "the practice of a physician's prescribing treatment for a patient whom he has never seen, and bases

⁶ Given the background to the 1959 amendments (see *Red Lion Broadcasting Company v. Federal Communications Commission*, *supra*), we are unable to see any significance in the fact that Congress did not also amend Section 317 to incorporate the Fairness Doctrine expressly. In any event, as stated, the absence of a specific reference to the Fairness Doctrine in Section 317 does not show a lack of Commission authority under the general provisions of the Act.

his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest." *Id.*, at 671-672. The Communications Commission has similarly condemned advertising of alleged medical prescriptions and quack remedies which were deemed inimical to health, and granted renewal only upon assurances that such broadcasting would be discontinued. *Farmers and Bankers Life Insurance Co.*, 2 F.C.C. 455, 457-459. The Commission stated that "[a] broadcast station carrying such programs should be held to a high degree of responsibility, affecting as they may the health and welfare of the listeners, and careful investigation of such products, and of the claims made therefor, should be made before they are advertised over a broadcast station." 2 F.C.C. at 458. See also *WSBC, Inc.*, 2 F.C.C. 293, 294-296, and *Oak Leaves Broadcasting Station, Inc.*, 2 F.C.C. 298 (both involving advertising of quack medicines by one not licensed to practice medicine). The Commission has also applied the Fairness Doctrine to products such as Krebiozen and to the health issues involved in Carlton Fredericks program, "Living Should be Fun." See 33 F.C.C. 101, 107 (1962).⁷

13. Mr. Justice Brennan, in his concurring opinion in the *Head* case, 374 U.S. at 439, noted that

"... As early as 1928, for example, the General Counsel of the Radio Commission held that abuses in network cigarette advertising—while not a sufficient basis for revocation proceedings against an individual licensee—might on renewal militate against the requisite finding of broadcasting in the 'public interest.' "

The opinion also notes (n. 15) that

"Shortly after the issuance of the General Counsel's opinion, the Chairman of the Federal Radio Commis-

⁷ As further administrative background in this area, see *In re petition of Sam Morris*, 11 FCC 197 (1946), where the Commission indicated the applicability of the Fairness Doctrine to advertising in certain situations.

sion was asked by Senator Dill during his appearance before the Senate Commerce Committee whether he thought the Commission had sufficient power 'through its power of regulation and its determination of public interest to handle objectionable advertising?' The
 822 Chairman replied, 'I think so, Senator Dill, because we have had little trouble about it, even without direct power. * * *.' " *Hearings before Senate Committee on Interstate Commerce on S. 6, 71st Cong., 1st Sess., pt. 6, p. 230.*

See also *Hearings before Senate Committee on Interstate Commerce on S. 6, 71st Cong., 1st and 2d Sess., pp. 88-89.* The particular complaint leading to the General Counsel's opinion charged, *inter alia*, that "the object of this broadcasting is to transform 20,000,000 adolescent boys and girls into confirmed cigarette addicts by creating a vast child market for cigarettes in the United States," that "10,000,000 boys throughout the country are being viciously and deliberately misled by paid testimonials, secured from professional athletes, football coaches and others, definitely suggesting the use of cigarettes as an aid to physical prowess," that "the medical opinion of the country is being continuously misrepresented to support the health and medical claims made for cigarettes," that the specific claims made for a particular brand of cigarette advertised on the air are overwhelmingly opposed by established health and medical facts," and that "Such radio activities, the petitioner maintains, are clearly contrary to public interest, public welfare and public health." Opinion No. 32, 1928-1929 Opinions of the General Counsel, Federal Radio Commission, 77, at 78 (April 15, 1929). General Counsel Bethuel M. Webster, Jr. concluded that the "Commission may find, in view of this showing, that public interest, convenience, and necessity will not be served by further renewal of the licenses in question, in which case the matter will be set for hearing pursuant to Section 11, and peti-

tioner's prayer for general relief will be granted." *Id.* at 82.

14. In short, we believe that the licensee's statutory obligation to operate in the public interest includes the duty to make a fair presentation of opposing viewpoints on the controversial issue of public importance posed by cigarette advertising (i.e., the desirability of smoking), that this duty extends to cigarette advertising which encourages the public to use a product that is habit forming and, as found by the Congress and Governmental reports, may in normal use be hazardous to health, and that the licensee's compliance with this duty may be examined
823 at license renewal time (see 1960 Programming Policy Statement, 20 Pike and Fischer, Radio Regulation 1901, 1912-1913). It is our belief that the public interest standard and Fairness Doctrine embodied this principle from their inception. In any event, even assuming the contrary, we think that the Commission clearly has the statutory authority to make this public interest ruling and to extend the Fairness Doctrine to cigarette advertising at this time. While the agency's position as to what the obligation to operate in the public interest requires for cigarette advertising may have fluctuated over the years since 1929, the exercise of such authority in the present circumstances is plainly reasonable. Considering the 1964 Report of the Surgeon General's Advisory Committee, the establishment of the National Interagency Council on Smoking and Health and the enactment of Cigarette Labeling and Advertising Act (Public Law 89-92, 15 U.S.C. 1331 *et seq.*) in 1965, and the recent Reports to Congress by the Federal Trade Commission and the Department of Health, Education and Welfare pursuant to that Act, it is not an abuse of discretion for the Commission to decide now that a licensee who presents programming and advertising which encourages the public to form this habit potentially hazardous to health has, at the very least, an obligation

adequately to inform the public as to the possible hazard.⁸ See *infra*, paragraphs 30-32. Nothing that is presented in the extensive pleadings filed in this matter convinces us that petitioners should prevail on their position to the contrary.

824 C. *Compatibility with the Cigarette Labeling Act*

15. Petitioners further urge that Congress in the Cigarette Labeling and Advertising Act of 1965 (Public Law 89-92, 15 U.S.C. 1331 *et seq.*) preempted Federal, State and local activity to compel health warnings in cigarette advertising, and that the Commission's ruling is not only inconsistent with that policy but lies also in an area where Congress has withdrawn authority. On the basis of our analysis of the provisions of the Labeling Act and its legislative history, we agree that no Federal or State body could legally adopt regulatory measures which would require either a cessation of cigarette advertising or the inclusion of a health warning in the advertisement itself. We nevertheless believe, for the reasons set forth below, that our ruling that broadcast licensees presenting cigarette advertising must otherwise inform the public as to the potential health hazard, is not precluded by the Labeling Act and is entirely consistent with the Congressional decision to promote extensive smoking education campaigns.

16. The Cigarette Labeling Act states that:

It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising

⁸ It has long been recognized, of course, that "the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes." *Pinellas Broadcasting Co. v. Federal Communications Commission*, 230 F. 2d 204, 206 (C.A.D.C.), *cert. den.*, 350 U.S. 1007.

with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

The Act thus requires the labeling of cigarette packages with the statement: "Caution: Cigarette Smoking may be Hazardous to Your Health." The Act also does the following: (1) makes it unlawful for any person to manufacture, import, or package for sale within the United States any cigarettes which do not bear the above-mentioned statement on the package. Violation of this requirement is made a misdemeanor subject to a fine of not more than \$10,000. (Sections 4, 6); (2) prohibits the requirement of any other cautionary statement on the labeling of cigarettes under laws administered by any Federal, State or local authority (Section 5(a)), and prohibits, for three years, any requirement by any Federal, State, or local authority that cigarette advertising include a statement relating to smoking and health (Section 5(b)); (3) states that the
825 Federal Trade Commission has no authority to require any cautionary statement in any advertisement of cigarettes labeled in conformity with the Act, but otherwise neither limits nor expands the authority of the FTC with respect to the dissemination of false or misleading advertisements of cigarettes (Section 5(c)); (4) permits injunctions to be obtained to restrain violations of the Act, and provides an exemption for cigarettes manufactured

for export from the United States (Sections 7 and 8); and (5) requires two Federal agencies to transmit reports to Congress before July 1, 1967 and annually thereafter: (a) the Secretary of Health, Education, and Welfare concerning current information on the health consequences of smoking and recommendations for legislation and (b) the Federal Trade Commission concerning the effectiveness of cigarette advertising, current practices and methods of cigarette advertising and promotion, and recommendations for legislation.

16a. Section 5—the portion pre-empting Federal, State and local activity to compel health warnings in cigarette labeling and advertising—provides in subsection (b):

No statement relating to smoking and health shall be required in the advertising of any cigarette the packages of which are labeled in conformity with the provisions of this Act.

It is clear from the wording of this section that neither the F.C.C. nor the F.T.C. could require cigarette advertisements to contain statements of health warnings. However, this does not mean that the F.C.C. or the F.T.C. cannot regulate in other respects concerning smoking and health. The section does not read, as petitioners would have it, that no statement by others interested in informing the public of the potential hazard from smoking may be required "because of the advertising of any cigarette"—i.e., not in or adjacent to the advertising but at some other time period, by others or the licensee, because the advertising has presented but one face of this important issue to the public. Moreover, although the Senate debate on the Labeling Act is not wholly clear in this respect,⁹ the House debate indicates that the F.T.C. is still free to regulate with respect to misleading or deceptive advertising concerning

⁹ 111 Cong. Rec. 15597-15598 (1965).

smoking and health under Section 5 of the Federal Trade Commission Act.¹⁰ For example, if an advertisement said that cigarette smoking was not a health hazard, the F.T.C. could act to prevent such advertising. The Chairman of the House Commerce Committee explained that the Labeling Act did not purport to change the present authority of the F.T.C., only to limit that authority with respect to compulsory inclusion of statements concerning smoking and health in cigarette labels and advertising.¹¹

See Section 5(c) of the Act. The F.C.C.'s regulatory authority was not discussed in the committee reports on the proposed legislation or in the legislative debates. Nevertheless the background and legislative history of the Labeling Act furnish some basis for judging what impact, if any, that Act has on the F.C.C.'s authority in this field, particularly under the Fairness Doctrine.

Legislative History

17. The pertinent background to the 1965 Act is set out in Appendix A. We turn here to the relevant legislative history. Prior to 1964 a number of bills had been introduced without enactment by Congress in an effort to compel cigarette manufacturers to acquaint the public in various fashions with the health hazards of smoking. With the Advisory Committee's Report as a catalyst, many bills were introduced during the Second Session of the 88th Congress embodying several approaches to acquaint the public with the hazards of smoking: (1) to require that cigarettes sold in interstate commerce be labeled with a health warning, and/or with a disclosure of nicotine and tar content (H.R. 4168; H.R. 7476; H.R. 9693); (2) to confer on the F.T.C. the power and duty to regulate advertising and labeling of cigarettes (H.R. 9655; H.R. 9657; H.R.

¹⁰ 111 Cong. Rec. 16541-16544 (1965).

¹¹ Remarks of Chairman Harris, 111 Cong. Rec. p. 16544 (1965).

9808; S. 2429); (3) to amend the Federal Food, Drug and Cosmetic Act so as to make that Act applicable to smoking (H.R. 5973; H.R. 9512); (4) to provide for informational and educational campaigns by HEW to acquaint the public with the health hazards involved in the use of cigarettes and to provide for continued research in this field (H.R. 9668; S. 2430); and (5) to enjoin all Government agencies, etc., from taking any action or pursuing any policy which encourages or promotes the public to buy or use cigarettes (S. 2430).

18. As a result of the submission of these bills, Chairman Harris conducted hearings from June 23, 1964 through July 1, 1964 before the House Commerce Committee concerning possible action by Congress. The purposes of the hearings were to review the scientific evidence of the causal link between smoking and cancer and, if Federal action was found to be required in the interest of public health, to determine what approach would be most desirable. Chairman Harris commented later that the closing days of that session of Congress had not permitted sufficient time for further hearings and for the preparation and consideration of carefully drawn legislation in this field. These hearings before the House Commerce Committee were the only hearings conducted on the subject of cigarette labeling and advertising by either side of Congress during the second session of the 88th Congress.

827 19. Legislative activity resumed in the first session of the 89th Congress with consideration of bills taking three basic approaches to the smoking health hazard problem: (1) to amend the Federal Food, Drug and Cosmetic Act to regulate smoking products (H.R. 2248); (2) to provide for a health warning and/or nicotine and tar content on the label of cigarette packages (S. 559; H.R. 3014; H.R. 4007; H.R. 7051; H.R. 4244); and (3) to give the F.T.C. the power and duty to regulate advertising and labeling of cigarettes (S. 547). Both the Senate and the

House Commerce Committees undertook hearings to determine the state of the medical evidence for and against the causal link between smoking and disease and to determine what Federal action, if any, should be required in the public interest. With regard to these questions, the Senate Committee concluded (S. Rept. No. 195, 89th Cong., 1st Sess., p. 3):

While there remain a substantial number of individual physicians and scientists—the Commerce Committee received testimony from 39 of them—who do not believe that it has been demonstrated scientifically that smoking causes lung cancer or other diseases, no prominent medical or scientific body undertaking a systematic review of the evidence has reached conclusions opposed to those of the Surgeon General's Advisory Committee.

The Commerce Committee, therefore, concurs in the judgment that "appropriate remedial action" is warranted.

The House Committee was unwilling to conclude for or against the medical opinions embodied in the Advisory Committee's Report or the medical evidence elicited by its own hearings. However, it did conclude that Congressional action should be taken with regard to the relationship of smoking and health. H. Rept. No. 449, 89th Cong., 1st Sess., p. 3.

20. As petitioners point out, Congress in enacting the Cigarette Labeling Act was concerned about possible economic impact on the tobacco and broadcasting industries, as well as the potential health hazard to the public. The House Report states (*id.*, at p. 3):

828 The determination of appropriate remedial action in this area, as recommended by the Surgeon General's Advisory Committee, is a responsibility which should be exercised by Congress after considering all facets of

the problem. The problem has broad implications in the field of public health and health research, and involves potentially far-reaching consequences for a number of sectors of our economy. The entire tobacco raising and manufacturing industry, and the numerous businesses which market tobacco products are involved. Some proposals have been made in this area which might lead to severe curtailing or the possible elimination of cigarette advertising. This could have a serious economic impact on the television, radio, and publishing industries in the United States.

21. The compromise evolved by Congress was to require a health warning in labeling, but not in advertising, for an interim period pending a further Congressional determination as to whether extensive smoking education campaigns and industry self-discipline would render such a drastic step unnecessary. The Senate Report states (S. Rept. No. 195, 89th Cong., 1st Sess., p. 5):

Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package, which will be required under the provisions of this bill, it was the Committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking.

The House Report similarly states that the Cigarette Advertising Code and the educational and informational programs of HEW in combination with the Labeling Act made it unnecessary to insert health warnings in cigarette advertising as proposed by the F.T.C. (H. Rept. No. 449, 829 89th Cong., 1st Sess., pp. 4, 5). The Labeling Act provides that the provisions which affect the regula-

tion of advertising shall terminate on July 1, 1969 (Section 10). The reason for specifying this termination date was the expectation of Congress that before that date, on the basis of all available information, including that contained in the reports to be submitted by HEW and F.T.C., it would re-examine the subject matter of the Labeling Act.

Conclusion

22. In light of the foregoing, it is our view that Section 5 of the Labeling Act was meant to preclude any requirement of a health warning in the advertising itself, as proposed by the F.T.C. rule (see par. 7, App. A), but there was no legislative intent otherwise to foreclose the use of radio, along with other educational media, as an effective means of informing the public to the potential hazard of smoking. The Fairness Doctrine has its reason for being in (1949 Report on Editorializing, 13 F.C.C. at 1249):

* * * the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting. [Footnote omitted.]

We also cannot believe that Congress would have overturned so basic a tenet of communications law and policy in this area or that it would have withdrawn so fundamental a responsibility of the Commission without some express indication and explanation. See par. 30, *infra*. On the contrary we believe that for reasons developed below,

our action is entirely consistent with the "comprehensive Federal program . . ." (Section 2, Cigarette Labeling Act), since it will promote the "extensive education campaigns," which Congress noted and relied upon in reaching the policy judgment embodied in the Act (see par. 21, *supra*).

830 23. As stated, our ruling accords with and is tailored to the legislative policy embodied in the Labeling Act. In the first place, the ruling does not require a health warning in or adjacent to cigarette advertising—a matter coming within Section 5(b) of the "preemption" portion of the Act. Rather it leaves to the good faith, reasonable judgment of the licensee—upon the facts of his situation—the matters of the type of programming, the nature of the time to be afforded for the opposing viewpoint, and the amount of time to be allocated on a regular basis.

24. Second, our ruling does not preclude or curtail presentation by stations of cigarette advertising which they choose to carry (see also, paras. 48-54, *infra*). We rejected Mr. Banzhaf's claim that the time afforded for the opposing viewpoint should "roughly approximate" that devoted to cigarette advertising, not only because the Fairness Doctrine does not require "equal time" but also in the belief that this would be inconsistent with the Congressional direction in this field provided in the Labeling Act. For, we recognized that the "practical result of any roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising." We stressed that our action would be tailored so as to carry out the Congressional purpose, and we shall of course adhere to that guideline in implementation of the ruling.

25. Most important, we think that our ruling implements the smoking education campaigns referred to as a basis

for Congressional action in the Labeling Act (*supra*, par. 21). Congress itself has affirmatively promoted such educational efforts by appropriating \$2 million for use by HEW in this direction. P.L. 89-156, Title II, Public Health Services, Chronic Diseases and Health of the Aged. As a consequence, HEW has established the National Clearinghouse for Smoking and Health. Its purposes are to collect, organize and disseminate information on smoking and health, to provide encouragement and support for state and local educational activities, and to conduct research into the behavioral nature of the smoking habit. The Public Health Service and others have acted to inform the public on smoking and health directly by sending lecturers across the United States to address local groups, distributing printed information to the public, and furnishing the broadcast media with spot announcements on smoking and health. The Public Health Service reported in January 1967 that it has distributed spot announcements to over 900 radio stations and is at present approaching individual television stations to obtain further coverage for its messages. The American Cancer Society reports that it has received favorable responses from all the networks and many independent stations concerning the promotion of its spots on smoking and health.

26. The Public Health Service has also worked through local organizations to warn the public of the health hazards of smoking. It is in direct contact with a number of regional, state, or local inter-agency advisory committees on smoking and health, which have worked to stimulate community interest in thirty-five states. As a result of this stimulus and others, the medical societies of at least 18 states have made statements linking cigarette smoking with lung cancer and other health hazards and, in some cases, have undertaken organized activity to publicize the relationship of smoking and health. For example, the California Medical Association has recently

undertaken a program urging individual doctors to acquaint their patients with the health hazards of smoking. Local and statewide civic groups have also started public education efforts.

27. The Public Health Service and the United States Children's Bureau have directed a special education campaign aimed at school age children. To date, school programs on smoking and health reach about 70 percent of the school children in the United States. Forty states have developed materials on smoking and health for children or plan to do so, and twenty-seven states have either held conferences on smoking and health or intend to do so. In September 1966 a nation-wide program to discourage smoking among 7th and 8th graders was launched by the National Congress of Parents and Teachers. This plan is being supported by the Public Health Service and is operating in 21 states.

28. The affected industries have renewed their efforts at self-regulation since the enactment of the Labeling Act. While there has been no change in the Cigarette Advertising Code of the cigarette manufacturers, they have sought and obtained F.T.C. approval to make factual advertising statements about tar and nicotine content. On March 25, 1966, the F.T.C. determined that a factual statement of the tar and nicotine content of the mainstream smoke from a cigarette would not be in violation of that Commission's 1955 Cigarette Advertising Guides or of any provision of the law administered by the Commission. However, no collateral statements (other than the factual statement of tar and nicotine content of cigarettes) suggesting the reduction or elimination of health hazards in smoking are allowed, and all these factual statements must be based upon a standardized testing technique.¹²

¹² New York Times, March 29, 1966, 53:6.

832 29. In October 1966 the Code Authority for the
 NAB issued the Cigarette Advertising Guidelines
 which they had announced during the 1965 Senate hearings
 would be forthcoming.¹³ The main objectives of the guide-
 lines are to restrict advertising appeals to youth and
 833 statements concerning the health benefits of smok-
 ing. In January 1967, the Code Authority announced
 in a news release a slight change in the Television Code to
 strengthen its position as to appeals to youth. The Tele-
 vision Code, Section IX, General Advertising Standards,
 Par. 7, now reads:

The advertising of cigarettes shall not state or
 imply claims regarding health and shall not be pre-
 sented in such a manner as to indicate to youth that
 the use of cigarettes contributes to individual achieve-
 ment, personal acceptance or is a habit worthy of
 imitation.

 13

Text of the New Cigarette Advertising Guidelines

Athletic Activity: A person who is or has been a prominent athlete shall not be used in a cigarette commercial. Cigarette commercials shall not depict persons participating in, or appearing to be participants in, sports or athletic activity requiring physical exertion.

Tar and Nicotine Statements: Factual statements of tar and nicotine content of cigarettes are subject to proper documentation. No statements or claims regarding benefits to health and well-being are acceptable.

Filters: Cigarette advertising shall not state that because of the presence of the filter or its construction the cigarette is beneficial to the health or well-being of the smoker.

Uniformed Individuals: Individuals in certain types of uniforms have a special appeal to youth. Therefore, such uniformed individuals as commercial pilots, firemen, the military and police officers shall not be used in cigarette advertising.

Premiums: Cigarette advertising shall not include references to offers of premiums which are primarily designed for youth.

Portrayal of Youth: Children or youth shall not appear in cigarette commercials in any manner, even though they are merely bystanders or part of the background. Cigarette advertising shall use individuals who both are and appear to be adults and who are shown in settings associated with adults.

30. Considering these affirmative efforts by Congress, federal, state and local public and private agencies, and the affected industries to educate the public as to the smoking health hazard and, particularly, to discourage youth from forming the habit, we are not persuaded by petitioners' argument that HEW and FTC have primary jurisdiction in this matter and that this Commission alone is precluded from following its traditional method of assuring that the public is adequately informed as to both sides of this controversial issue of public importance. Significantly, Congress was at pains to spell out what was preempted (Sections 5 (a) and (b), and specifically stated that except as is otherwise provided in subsections (a) and (b), "nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes" Similarly, we believe that there was no preclusion of FCC action, so long as such action is consonant with the "comprehensive Federal program . . ." (Section 2). As set forth in the prior discussion, we think that our responsibilities and policies under the Communications Act and our ruling herein are entirely consonant with the Congressional objectives in this area. Indeed, it is our belief that the Commission could not properly follow any other course in this matter. For this Commission, like other administrative agencies, was "not commissioned to effectuate the policies" of the Communications Act "so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Southern S.S. Co. v. Labor Board*, 316 U.S. 31, 47.

834 31. One further contention of petitioners on this aspect warrants discussion. It is asserted that we are precluded from issuing our ruling because the Commission declined to make any recommendation to Congress in connection with the Labeling Act legislation on the ground that it had not yet studied the matter, and because the Commission still has not conducted any study or proceeding on the smoking hazard issue. The circumstances giving rise to the contention are as follows: Prior to the issuance of the Advisory Committee Report, the Commission stated in a "by direction" letter, concerning possible rule making with regard to advertising, promoting or encouraging cigarette smoking among young people, that action would be inappropriate before the Advisory Committee's Report was available and (Letter to Senator Magnuson, F.C.C. 63-1033):

The Commission's concern is limited, of course, to advertising in the broadcast field. Other agencies may have authority to take comprehensive and effective action, if necessary or appropriate. It is, we think, obviously more desirable to treat such an important matter, if possible, on a broad, across-the-board basis rather than in piece-meal fashion.

When the Advisory Committee's Report was issued and the F.T.C. had announced its rule making proceeding concerning cigarette labeling and advertising (see App. A), the Commission on January 1964 initiated plans to coordinate its efforts with the comprehensive regulation which the F.T.C. had proposed and with activities of other interested agencies. FCC Letter to F.T.C. Chairman Dixon, FCC 64-29 (January 15, 1964). On February 7, 1964, in "by direction" letters to Congressman Leonard Farbstein (FCC64-100) and his constituent, Mr. Sidney Katz (FCC64-99), then Chairman Henry answered a request to institute rule making proceedings to ban cigarette advertising by reiterating the policy statement quoted above and noting

that the Commission would await the results of the F.T.C. rule making proceeding before acting in this area. When asked to comment on S.2429, 88th Cong., and S.547 and S.559, 89th Cong., the Commission reiterated its policy that it favored "across-the-board treatment of the matter of regulating cigarette advertising and that since the F.T.C. had undertaken a comprehensive remedial regulatory plan, the F.C.C. had not held proceedings or undertaken studies to evaluate the various factors and considerations in this area. Comments on S.2429, 88th Cong., FCC 64-730; Comments on S.559 and S.547, FCC 65-96.

835 32. We do not believe that these facts preclude us, as a matter of law or of policy, from issuing our ruling in the present circumstances. First, as shown above, circumstances have changed. The F.T.C., while proceeding in other respects consistent with the 1965 Act, is not, of course, undertaking its comprehensive regulatory plan to require a health hazard announcement to accompany each cigarette commercial. Second, as also shown above, our ruling is consistent with and particularly suited to promoting the "across-the-board" objective of Congress to treat this matter through extensive campaigns to educate the public as to the hazards of smoking. Third, we did not defer to the F.T.C. as a matter of legal authority but rather of policy. The Commission is not precluded from changing its policies so long as any new policy adopted is, like our ruling, reasonable in the circumstances. See *supra*, par. 14 and footnote 8. And, finally, studies by this Commission are clearly not required to evaluate the various factors and public interest considerations posed by the issue of smoking and health, particularly since Congress declared and pursued its policy of promoting smoking education campaigns. In this connection, see also the discussion below (paras. 33-34 and 60-62).

33. On July 12, 1967, HEW submitted its Report to Congress, which includes the Surgeon General's Report on

Current Information on the Health Consequences of Smoking. Upon the basis of more than 2000 research studies that have been completed and reported in the biomedical literature throughout the world in the intervening three and one-half years since the Advisory Committee's Report, the Surgeon General states that there is no evidence calling into question the conclusions of the 1964 Report and, on the contrary, the research studies published since 1964 have strengthened those conclusions. The Surgeon General summarizes the present state of knowledge of these health consequences, in the judgment of the Public Health Service, as follows (Surgeon General's Report on the Health Consequences of Smoking—1967, p. 2):

1. Cigarette smokers have substantially higher death rates and disability than their non-smoking counterparts in the population. This means that cigarette smokers tend to die at earlier ages and experience more days of disability than comparable non-smokers.
2. A substantial portion of earlier deaths and excess disability would not have occurred if those affected had never smoked.
- 836 3. If it were not for cigarette smoking, practically none of the earlier deaths from lung cancer would have occurred; nor a substantial portion of the earlier deaths from chronic bronchopulmonary diseases (commonly diagnosed as chronic bronchitis or pulmonary emphysema or both); nor a portion of the earlier deaths of cardiovascular origin. Excess disability from chronic pulmonary and cardiovascular diseases would also be less.
4. Cessation or appreciable reduction of cigarette smoking could delay or avert a substantial portion of deaths which occur from lung cancer, a substantial portion of the earlier deaths and excess disability from chronic bronchopulmonary diseases, and a portion of the earlier deaths and excess disability of cardiovascular origin.

In releasing the Report, HEW Secretary John W. Gardner stated (HEW Press Release for July 13, 1967):

The relationship between smoking and health has obvious and serious implications for individuals who now smoke and for young people who may be thinking of starting to smoke. From the standpoint of public policy and social concern, this association constitutes one of the most critical health problems today.

It is perfectly obvious that if we are going to reduce the unnecessary death and illness now caused by cigarette smoking, three things must take place: There must be a reduction in the number of people who smoke, a number which now constitutes 42 percent of our population. We must do everything we can to encourage young people not to start smoking; at present, half of our young people are cigarette smokers by the time they are 18. And finally, we must work toward the development of a less hazardous cigarette and, concurrently, help develop a climate of opinion which will encourage acceptance if such a cigarette is developed.

837 34. The June 30, 1967 Report of the FTC to Congress pursuant to the Labeling Act stressed the importance of educating teenagers before they start smoking since the use of cigarettes is so strongly habit forming (Report, p. 8). The FTC Report states (p. 13) that whether intentional or fortuitous, teenagers appear to be a prime target for televised cigarette advertising and that the "average American teenager sees more cigarette commercials on network television than does the average American" (p. 25); "'87.9% of teenage boys' and '89.5% of teenage girls hear radio on the average day'" (p. 13). The Report comments (p. 24):

In making a decision on whether to start smoking, youngsters especially have a right to know that once they start, they may never be able to stop. A viewer of cigarette commercials and advertisements would never hear of this aspect of smoking.

The concluding paragraph of the F.T.C. Report states (p. 29):

Cigarette commercials continue to appeal to youth and continue to blot out any consciousness of the health hazards. Cigarette advertisements continue to appear on programs watched and heard repeatedly by million (sic) of teenagers. Today, teenagers are constantly exposed to an endless barrage of subtle messages that cigarette smoking increases popularity, makes one more masculine or attractive to the opposite sex, enhances one's social poise, etc. To allow the American people, and especially teenagers, the opportunity to make an informed and deliberate choice of whether or not to start smoking, they must be freed from constant exposure to such one-sided blandishments and told the whole story.

35. This Commission agrees. Considering all of the foregoing, we believe that our ruling is within our statutory authority and not precluded by the Congressional policy embodied in the Labeling Act—that rather it implements that policy. We also think it is imperative in the public interest that we exercise our discretion now without delay for further studies.

838 *D. The Argument as to Blanket Ruling*

36. Petitioners further contend that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission has invalidly made a blanket ruling that any cigarette advertisement *per se* presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose. But this argument misconceives the nature of the controversial

issue. Mr. Banzhaf's complaint was that the cigarette commercials over WCBS-TV presented the point of view that smoking is "socially acceptable and desirable, manly, and a necessary part of a rich full life." Our ruling points out that:

The advertisements in question clearly promote the use of the particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. But we believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

Petitioners point to no example of a cigarette commercial that does not portray the use of the particular cigarette as attractive and enjoyable as well as encourage people to smoke, and we find it difficult to conceive of one.

37. Further, we are unable to accept the argument that in the absence of any express health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose. The June 30, 1967 F.T.C. Report amply documents its conclusion that cigarette commercials today still contain the two principal elements it found to exist in 1964—a portrayal of the desirability of smoking and assurances of the relative safety of smoking (pp. 15-16). The F.T.C. states that desirability is portrayed in terms of the satisfactions engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences, and that by so doing the impression is conveyed that smoking carries relatively little risk
839 (ibid.).¹⁴ The Report supports this conclusion, more than adequately in our view, by a comprehensive

¹⁴ The FTC Report states (p. 17) that an estimated 58% of the public feel that current cigarette advertising leaves the impression that smoking is a healthy thing to do.

review and analysis of the advertising submitted by a large number of cigarette companies and monitored by the Commission (FTC Report, pp. 15-23). Numerous examples are given of the "satisfaction" theme (pp. 15-16)¹⁵; the "associative" theme (pp. 16-17)¹⁶; "appeals directed to vanity" (pp. 17-18)¹⁷; subtle methods of "assuaging

¹⁵ The Report states that portrayal of satisfaction, particularly oral satisfaction, continues to be an important element of cigarette advertising. Taste or flavor of cigarettes is most often described in terms of "mildness" (Tareyton filters, Montclair menthols, Camel regulars, Carlton filters, Lucky Strike filters, Pall Mall filters, and Chesterfield kings); "smoothness" (Tareyton filters, Pall Mall kings, Newport menthols, and Lucky Strike menthols); "real", "true", "rich" or "great" tobacco flavor or taste (Raleigh filters, Newport menthols, Viceroy filters, Salem menthols, and Philip Morris filters). Invariably, the taste of menthol cigarettes is either cool, fresh and/or refreshing ("coolest flavor," Lucky Strike Green; "forest-fresh taste . . . cooler tasting," Pall Mall; "as fresh as you like it," Philip Morris; "most refreshing coolness," Kool; "fresher," Newport; "fresh menthol flavor," Camel; "Springtime fresh" and "refreshes your taste," Salem; "a full, fresh taste," Chesterfield). The FTC comments (p. 16): "The impression forms that 'menthol taste' relieves smoking irritation, albeit 'smoking irritation' is never expressly stated.

¹⁶ The Report states (p. 16) that associating cigarette smoking with persons, activities, places and things likely to be admired, respected or emulated, i.e., endowing cigarette smoking with a positive associative image, continues unabated in current advertising. For example, outdoor activity of an athletic nature such as sailboating "suggests that the smoking depicted in the foreground, if not conducive to rousing good health, is certainly not incompatible with it" (FTC Rept., p. 17). In addition, social events abound in which the viewer is brought into the "wholesome, jolly company of cigarette smokers" (*ibid.*). E.g., "singing aboard the old paddle wheel steamer (with Pall Mall kings); * * * picknicking (with Camel filters); and coffee klatching (with Winston filters)."

¹⁷ The Report gives as examples of appeals to vanity (pp. 17-18):
"Be discriminating: 'Particular about taste . . . I'm particular' (Pall Mall Kings); 'They like the style of this cigarette' (Parliament filters).
Be exclusive: * * * 'exclusive plastic pack' (Philip Morris filters and menthols); 'There's no other cigarette' (Lark filters). * * * 'the smokers who know' (Camel filters).
Be a success: 'tastes rich, good, rewarding' (Viceroy filters); 'This man was born rich' (Camel filters).
Be a social success: "Come up to the taste of Kool' (Kool menthols); 'find something better' (Old Gold filters).
Be independent: 'break away from the crowd . . . the cigarette for independent people' (Old Gold filters); 'stands out from the crowd' (Salem menthols).
Associate with important people: 'Chairmen are never bored with them' (Benson & Hedges filters); the charter boat skipper who has 'got a good ship, a good crew and a good breeze' (Camel regulars)."

anxiety" about any health hazard (pp. 19-21)¹⁸; the "loyalty" theme (pp. 15-16)¹⁹; and the "bonus" theme, which includes promoting longer cigarettes at popular prices as well as coupon promotions (pp. 22-23).²⁰ We note also the FTC's comment ²¹ (Report, p. 18):

There is in all of the array of positive images an element of escape from actuality. Some cigarette advertising transcends mere image association and projects its own separate and unique world. Examples include "Salem Country," a land in which romantic couples romp and preen through shifting, sylvan set-

¹⁸ The Report states that as a result of extensive promotion during 1957-1959, the belief appears to be widely held that filter cigarettes are less hazardous to health than regular cigarettes (p. 19). Comparatively overt attempts to allay health anxieties have been made by manufacturers of charcoal filter cigarettes by pictorial details of filters creating the impression that they prevent passage of tars and gaseous effusions (Tareyton, Lucky Strike, Tennyson, Cold Harbor, King Sano, Tempo, Duke and Lark). Rept., p. 20. Other "very low key" advertising enhances the impression of relative safety by adding suitable adjectives to the word "filter": "recessed filters" (Benson & Hedges and Parliaments), "white filters" (Yorks), "menthol filters" (Springs) and filters with coconut shell charcoal" (Philip Morris). *Ibid.*

¹⁹ See Report (p. 22). Underlying these "loyalty" theme examples is, of course, the promise that the particular cigarette gives great satisfaction (e.g., "Change to Winston and change for good").

²⁰ The Report states (p. 23): "The purchase of Raleigh cigarettes has long been rewarded with coupons redeemable for goods. Today, Belair menthols, Old Gold filters, York filters, Spring menthols, and Domino filters also carry coupons redeemable for goods. Menthol and filter Chesterfields and Philip Morris carry coupons redeemable for more cigarettes." The Report also gives examples of 100 millimeter cigarette advertising (Benson & Hedges, Lucky Strike, Winston, and Pall Mall), and states (*ibid.*): "With a definite relationship having been established between amount of cigarette smoking and incidence of lung cancer and other diseases, a fitting motto for the 100-millimeter cigarette campaign might be 'extra health hazard at no extra cost'" (footnotes omitted).

²¹ While we have, as petitioners point out, distinguished between explicit and implicit raising of controversial issues in broadcast material where health was not involved (e.g., atheists and agnostics versus the broadcast of religious services), we do not regard those cases as pertinent here in view of the nature of the controversial issue.

tings; the "Night People," whose post evening encounters can lead to smoking Parliament filters; and "Marlboro Country," where there daily unfolds the simple male heroic virtues of the "Old West." Worry over health has been vanished from these Shangri-las.

38. It comes down, we think, to a simple controversial issue: the cigarette commercials are conveying any number of reasons why it appears desirable to smoke but understandably do not set forth the reasons why it is not desirable to commence or continue smoking. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose. We see no inequity in the circumstance that cigarette advertisers are precluded by various codes from making affirmative health claims in the advertising programming.²² The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials. And, finally, we fail to see any merit in the argument that no controversial issue of public importance can be presented where a lawful business is advertising a

²² We recognize also (as set forth in para. 29 above and Appendix A) that the tobacco and broadcasting industries have endeavored in their codes to prescribe cigarette advertising standards aimed at reducing the appeal to youth. But the conclusions of the FTC Report (par. 37 above) and the statistics and other matters set forth in paras. 33-34 and 60-61 would seem to indicate that the standards are either not being followed or are not effective in discouraging new teenage smoking. Moreover, it occurs to us that teenagers on the verge of adulthood may be more influenced by a portrayal of the attractiveness and desirability of adult conduct than by one connoting childhood or youthful behavior. As the FTC Report notes (p. 8): "They tend to view cigarette smoking as a visible mark of maturity, a passport to adulthood. Because the health dangers of cigarette smoking are not brought home to them in an effective and meaningful way, many teenagers take up the smoking habit."

lawful product.²³ While an unlawful business advertising an unlawful product over the air waves might well raise some controversial issue of public importance, we do not regard that element as essential. The claim that no controversial issue of public importance is presented by cigarette advertising is neither realistic nor persuasive.

843 *E. The Contention as to a Substitution of
"Commission Fiat" for Licensee Judgment*

39. Petitioners also argue that the ruling, by requiring that a significant amount of time be allocated each week to cover the viewpoint of the health hazard posed by cigarette smoking and by suggesting that a licensee might, among other things, present a number of public service announcements of the American Cancer Society or HEW, will cause a debasement of the Fairness Doctrine generally and a substitution of Commission fiat for licensee judgment. CBS in particular, noting that commercials are by nature repetitive and continuous, urges that treating all cigarette commercials as presentations of one side of a controversial issue will raise a question as to whether any one program or program series—however enlightening and informative as to all points of view—can constitute an adequate opportunity for response. Asserting that inevitably the licensee's only recourse will be a series of health hazard spot announcements, CBS states that broadcast treatment of cigarette health issues should not be reduced to a contest of opposing spot announcements, endlessly repeated

²³ NBC, in urging that licensees could reasonably and in good faith conclude that no controversial issue of public importance is presented by cigarette advertising, notes that the F.T.C. advertising guides permit presentation of enjoyment since they state:

"Nothing contained in these guides is intended to prohibit the use of any representation, claim or illustration relating solely to taste, flavor, aroma, or enjoyment."

Our ruling is consistent. It, too, does not in any way prohibit the presentation of enjoyment in cigarette commercials. It merely requires the licensee adequately to inform the public of the potential hazard, as found by Congress and Government reports, entailed in commencing or continuing this habit.

long after any member of the public has understood and acted if he wished. It further asserts that such an approach makes no sense in the area of news and public affairs programming and that the net result of our ruling will be to convert licensee responsibility in such areas to presentations very similar to product advertising.

40. Like CBS, we recognize that the presentation of one side of a controversial issue of public importance in advertising programming poses a situation which differs from that usually pertaining to the presentation of controversial issues in news and public affairs programming. In the latter instance, the issue may arise only once, or a few times, or several times in a relatively short time period because of factors such as timeliness. But as CBS points out, commercials are by nature "repetitive and continuous;" the complaint here went to advertisements broadcast daily for a total of five to ten minutes each broadcast day. We think that the frequency of the presentation of one side of the controversy is a factor appropriately to be considered in our administration of the Fairness Doctrine under the Act's basic policy of the "standard of fairness" (*supra*, par. 10). For, while the Fairness Doctrine does not contemplate "equal time", if the presentation of one side of the issue is on a regular continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issue. This

844 consideration is not limited to advertising. For example, if one side of a controversial issue of public importance were regularly presented in a daily network program, compliance with the Fairness Doctrine would require something more than an occasional presentation of the other side of the issue during the course of the year.

41. Moreover, here the controversial issue posed is one of health hazard and the repeated and continuous broadcasts of the advertisement may be a contributing factor to the adoption of a habit which may lead to untimely death.

In the circumstances, we think that the licensee is under a higher duty than in the case of other controversial issues to ameliorate the possible harmful effect of the broadcasts by sufficiently informing the public as to the hazard. As indicated in our ruling, and in light of the considerations set forth in paras. 33-34 and 60-61, we believe that the frequency of the presentation of the one side and the nature of the potential hazard to the public here necessitates presentation of the opposing viewpoint on a regular basis (e.g., each week).

42. We note that, contrary to CBS' position, the repetition of short communications has apparently been regarded by the broadcasting and advertising industries and other interested organizations as an effective means of reaching the listener or viewer. But in any event, there is nothing in our ruling which compels a licensee to treat the issue through presentation of spot messages. In our ruling we stated: "A station might, for example, reasonably determine that the above noted responsibility would be discharged by presenting each week, in addition to appropriate news reports or other programming dealing with the subject, a number of the public service announcements of the Cancer Society or HEW in this field." This example does not on its face indicate that the opposing viewpoint should be presented solely or principally through spot announcements, and it was not intended as a "Commission fiat" as to the manner of compliance with the Fair-
845 ness Doctrine.²⁴ We stressed in the ruling, and here

²⁴ As set forth in par. 25, prior to our ruling the American Cancer Society received favorable responses from all the networks and many independent stations concerning the promotion of its spots on smoking and health. Moreover, the Public Health Service reported in January 1967 that it had distributed spot announcements to over 900 radio stations and was then approaching individual television stations to obtain further coverage for its messages. The example we gave merely took cognizance of the fact that such material is available to licensees if, in their judgment, its use would facilitate compliance with their obligations under the Fairness Doctrine. We thought it desirable to note its availability particularly for the small station with limited resources, which might have difficulty in preparing its own program material dealing with this issue.

strongly emphasize again, that "in this, as in other areas under the fairness doctrine, the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the particular facts of his situation. See *Cullman Broadcasting Co.*, F.C.C. 63-849 (Sept. 18, 1963)."

43. In other words, we agree with CBS that the "question of whether a licensee is responsibly complying with the fairness doctrine cannot be resolved by *per se* guidelines, ratios or other rigid rules." A licensee which has just presented a very lengthy program on this issue obviously might reach a different judgment as to what his obligation was in this respect for the next week or so. But as stated, the carriage of the normally substantial amount of weekly commercials raises a concomitant responsibility to be met over relatively the same period of time. Further, in these circumstances, while a one-to-one ratio is ruled out by considerations of the legislative history of the Cigarette Labelling Act, the licensee's obligation is just as clearly not met by an occasional program a few times a year or by some appropriate announcements once or twice a week. We stress again that what is called for is the allocation of a significant amount of time each week, absent unusual circumstances, to the presentation of the opposing viewpoint in the case of cigarette commercials. We do not see why licensees, proceeding in good faith, should experience any real difficulty in reasonably discharging that responsibility nor why, in view of the nature of the issue—the public's health, they would seek to fulfill that obligation in a niggardly fashion, designed to raise problems or complaints. In sum, we have not usurped licensee judgment as to the type of programming or the amount or nature of the time to be afforded, but rather have left these matters to the good faith, reasonable judg-

ment of the licensee based on his evaluation of the facts of his particular case.²⁵

846 *F. Effect of the Ruling on the Advertising
of Products Other Than Cigarettes*

44. Petitioners further assert that the ruling cannot logically be limited to cigarette advertising alone, and hence will have broad-scale effect on broadcast operations and the presentation of advertising by radio generally. They state that very little in society is uncontroversial and, since many products are subject to one form of controversy or other, an appeal to the Commission by a vocal minority is all that is needed to classify a subject as controversial and of public importance. They further claim that if governmental and private reports on the possible hazard of a product are a sufficient basis for the cigarette ruling, the ruling would apply to a host of other products, such as: automobiles, food with high cholesterol count, alcoholic beverages, fluoride in toothpaste, pesticide residue in food, aspirin, detergents, candy, gum, soft drinks, girdles and even common table salt. We do not find this "parade of horrors" argument impressive.

45. We stressed in our ruling that it was "limited to this product—cigarettes," stating further in this connection:

Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and Con-

²⁵ It is also argued that the licensees may simply substitute cigarette health messages for other public service announcements now being carried. The duty of a station carrying cigarette commercials to inform the public as to the hazards of smoking stems directly from the fact that its facilities have been used to promote the use of this product found by the Congress and Governmental reports to be so potentially hazardous to health; its responsibility is therefore the same as in the case of any other fairness situation. It thus has a duty to present the other side, over and beyond what a licensee decides in other respects to present in order to serve the best interests of his area. We therefore do not believe that a licensee would or should adopt a pattern of operation which he does not adjudge to serve fully the needs and interests of his public.

gressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that the normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular product as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

Our ruling does not state, and was in no way meant to imply, that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance. Rather, the key factors here were twofold: (1) governmental and private reports and Congressional action with respect to cigarettes, and (2) their assertion in common that "normal use of this product can be a hazard to the health of millions of persons."

847 46. The products to which petitioners refer do not present a comparable situation. The example most uniformly cited is auto safety. But the governmental and private reports on this matter do not urge the public to refrain from "normal use" of automobiles in the interest of public safety; rather, the emphasis is on increased safety features in the manufacture of automobiles and increased care by drivers. Moreover, we know of no widespread contention by governmental or private authorities that the "normal use" of any of the other products cited by petitioners poses a serious health hazard to millions of persons who otherwise enjoy good health.

47. We adhere to our view that cigarette advertising presents a unique situation. As to whether there are other comparable products whose normal use has been found by

Congressional and other Government action to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance, bringing into play the Fairness Doctrine, we can only state that we do not now know of such an advertised product, and that we do not find such circumstances present in petitioners' contentions about the advertised products upon which they rely. Thus, to say the least, instances of extension of the ruling to other products upon consideration of future complaints would be rare, if indeed they ever occurred. In short, our ruling applies only to cigarette advertising, and imposes no Fairness Doctrine obligation upon petitioners with respect to other product advertising.

G. The Claim as to Adverse Financial Impact Upon the Broadcasting and Tobacco Industries

48. Petitioners further assert that the ruling will seriously undermine the commercial structure of broadcasting, cause a substantial reduction in or the elimination of cigarette advertising to the severe detriment of these stations and their ability to serve the public interest, require a major change in the operation of broadcast stations by necessitating the acquisition and presentation of new program material and the keeping of additional records to document compliance with the Fairness Doctrine, limit the ability of cigarette manufacturers and advertisers to obtain advertising time on broadcast media, and adversely affect the sale of cigarettes, all of which will impose an unlawful burden on interstate commerce and conflict with the Congressional intent underlying the Cigarette Labeling Act.

848 49. The contention that our ruling will seriously undermine the commercial structure of broadcasting is pressed principally by the Association of National Advertisers, Inc., an association composed of leading manufacturers and service concerns that use advertising, seven

of whom market cigarettes. Their concern appears to rest principally on the fear that the ruling will be extended to many other products which are subject to controversy in one form or another. However, as set forth in the proceeding section of this opinion (*supra*, paras. 44-47), we believe that this fear is groundless. The only real question here is the impact of our ruling on cigarette advertising on broadcast media and the sale of cigarettes.

50. We have no reason to think, and petitioners have proffered nothing concrete in support of their claim, that the ruling will cause any substantial reduction in or the elimination of cigarette advertising on broadcast media or adversely affect the ability of broadcast licensees to serve the public interest. As we have stated, we shall tailor the requirement that a station which carries cigarette commercials provide a significant amount of time for the other viewpoint, so as not to preclude or curtail presentation by stations of cigarette advertising that they choose to carry.

51. Nor do we think it realistic to assume that the requirement will cause cigarette advertisers and manufacturers to turn to other advertising media. The attractiveness of the broadcast media, particularly television, as a means of effectively reaching the vast majority of the American public with advertising, as well as other, messages is without equal.²⁶ We find it difficult to believe that cigarette manufacturers and advertisers would abandon or make substantially less use of a medium of this nature merely because our ruling may require an increase in the programming on the smoking-health issue which broadcast licensees are already presenting in the exercise of their

²⁶ The FTC Report states (p. 10) that more of the money spent for cigarette advertising in the year 1966 was spent on television advertising than on all other media combined (66.6 percent in 1966). The Report also states (*ibid.*) that "in 1966, cigarette advertising accounted for approximately 7.2% of total television advertising expenditures."

judgment under the Fairness Doctrine and pursuant
849 to their obligation to operate in the public interest.²⁷

Rather, particularly in light of the consideration set forth above (par. 50), we are not persuaded that the effect of our ruling on the amount of cigarette advertising presented on broadcast media will be significant.²⁸

52. We also fail to see how the ruling would require any major change in the operation of broadcast stations. In complying generally with the Fairness Doctrine in their overall broadcast operations, broadcast licensees are required to afford reasonable opportunity for the presentation of the other side of controversial issues of public importance when they choose to present one side, and to document their efforts upon complaint. Our rules require the keeping of program logs (See, e.g., §§ 73.111 and 73.112; see also Section 303(j) of the Communications Act), and we are sure that licensees in the conduct of their business affairs presently keep full accounts as to advertising matters. Thus, we think that this particular controversial issue can be handled by licensees in a manner similar to their established practices in this area.²⁹

53. There is nothing in our ruling which would preclude or curtail the ability of cigarette manufacturers to obtain advertising time on broadcast media. Licensees remain free to present such cigarette advertising as they choose. Conceivably, some licensees, in view of the mounting public

²⁷ In this connection, we note that many stations and the television networks (e.g., CBS's efforts as detailed in this case) have given coverage to the smoking-health issue and that they also continue to air numerous cigarette commercials.

²⁸ Certainly, there is no reason to anticipate that any such minimal impact could have any substantial adverse effect upon the ability of broadcast stations to serve the public interest. Cf. also FTC Report of June 30, 1967 at p. 10.

²⁹ We note that WCBS-TV apparently had no difficulty in ascertaining what programs that station had broadcast on this issue in response to Mr. Banzhaf's complaint.

concern as to the potential health hazard of cigarette smoking, might voluntarily decide to curtail or refrain from cigarette advertising broadcasts in the public interest. But that is appropriately a matter for licensee judgment as to how to conduct broadcast operations to serve the public interest, and not a requirement of our ruling. Under Section 3(h) of the Communications Act, broadcasters are not common carriers and they cannot be compelled
 850 to present advertising which they do not wish to present. Moreover, cigarette manufacturers clearly have no right to insist that a broadcast licensee, who is willing to present cigarette advertising, present it in a manner that does not comport with his statutory obligation to operate in the public interest. Nor does a cigarette manufacturer have any legal right to complain that the use of radio to inform the public as to the potential health hazard of cigarette smoking may lead to some decline in cigarette sales or slow down the present trend of rising cigarette sales (FTC Report, pp. 4-7). Indeed, that is the very purpose of the educational efforts which Congress has directed HEW to undertake.

54. In sum, we see no merit to the contention that our ruling will lead to severe curtailment or possible elimination of cigarette advertising, or have a serious economic impact on the broadcasting industry, contrary to the intent of Congress in the Labeling Act. The ruling properly effectuates the responsibilities of broadcast licensees and this Commission under the Communications Act. There is no unlawful burden on interstate commerce nor conflict with Congressional intent in, or the provisions of, the Labeling Act.

H. The Procedural Contention

55. Finally, petitioners urge that the ruling is procedurally invalid because it effects an important and unprecedented change of policy which will affect all licensees

and it was adopted without affording WCBS-TV, broadcast licensees generally and other interested persons an opportunity to be heard. CBS, in particular, asserts that this was a departure from the Commission's procedure of advising a licensee of a fairness complaint and requesting its comments (Fairness Primer, F.C.C. Public Notice of July 1, 1964, 29 F.R. 10415, 10416, cited with approval in the *Red Lion* case, *supra*, par. 8). CBS requests that the contents of its letter be treated as its comments on 851 Mr. Banzhaf's complaint, and that we reconsider the ruling on the basis of such comments.³⁰

56. We have granted this request of CBS and have carefully considered its comments in determining that reconsideration is not warranted by the arguments contained in its letter. Our omission to seek the comments of WCBS-TV initially was occasioned by our view that Mr. Banzhaf's complaint, which enclosed his request to WCBS-TV and the reply of that station, adequately set forth the facts of the case and the positions of the parties. Since WCBS-TV has a continuing policy of presenting the smoking-health hazard controversy and asserted only its position that the Fairness Doctrine does not apply to advertising, our letter of June 2, 1967 to that station had two purposes: One, to apprise WCBS-TV of the Commission's view that the Fairness Doctrine does apply to cigarette advertising, as a matter of law and policy, and second, to bring to the station's attention our view that a sufficient amount of time must be allocated, usually each week, for the

³⁰ NBC notes that the Commission did not have before it the text of the three commercials Mr. Banzhaf referred to as examples. It has attached to its comments the texts of three advertisements and states that two of them appear to be those mentioned in the complaint and the third is probably the other. NBC further states: "They may show 'attractive' people 'enjoying' themselves while smoking cigarettes, but surely that does not constitute the expression of a viewpoint on whether smoking is a hazard to the smoker's health." For the reasons stated in para. 38 above, we do not think that the text of the particular advertisements was necessary to our ruling or to our decision on the requests for reconsideration.

opposing viewpoint so that WCBS-TV could appropriately exercise its licensee judgment in connection with its continuing program. As stated in par. 6, *supra*, the effectiveness of the June 2nd ruling will not be the basis for action against any licensee, including WCBS-TV, until publication of this Memorandum Opinion and Order in the Federal Register. In the circumstances, and particularly the fact that we have fully considered the comments submitted by CBS on reconsideration, we conclude that WCBS-TV has not been prejudiced by the procedures followed in this matter.

57. It is true that other interested persons were not accorded an opportunity to be heard prior to the ruling. It is not the Commission's normal procedure or usual practice to accord the public in general an opportunity to be heard with respect to fairness complaints against a particular licensee, even though the complaint may involve an important issue of policy (see, e.g., *Cullman Broadcasting Company*, FCC 63-849; *Times Mirror Broadcasting Co.*, 24 R.R. 404 and 407 (1962)). We thus followed long established procedures in this respect. In any event, we have now heard at length from the three television networks, numerous individual broadcast licensees, the NAB, and representatives of the advertising and tobacco industries. We have given extensive consideration to the arguments raised in support of their positions, and have found them without merit. Moreover, the ruling is not effective as to any broadcast licensee until publication of this opinion in the Federal Register. In the circumstances, we conclude that petitioners have been adequately heard and have suffered no prejudice.

58. Further, we are unable to conclude that any useful purpose would be served by affording petitioners a further opportunity for written comment or oral argument. The viewpoints of petitioners on the legal and policy issues are fully and amply set forth in the pleadings already filed, and nothing has been presented which would indicate

the need or desirability of further study or proceedings; thus we are not persuaded that any public purpose would be served by initiating rule making in this area, as requested by the law firm of Smith, Pepper, Shack and L'Heureux. We note that the petition for rule making does not propose the adoption of any rules, but only the provision of a forum for consideration of the legal and policy arguments urged by petitioners and discussed herein. We do not think that a rule making proceeding is either needed or appropriate for their resolution.³¹

853 59. And, finally, we point out that we could not in any event conclude that stay relief would be warranted pending any such further proceedings. This is not only because we believe that petitioners have not shown any substantial likelihood of ultimately prevailing on the merits of their position, either before this Commission or the courts, but also because the public interest would require denial of such relief on injury grounds. We have already set forth the basis for our belief that compliance with the ruling will not cause any substantial adverse impact on the broadcasting or advertising industries. We have not been shown that any irreparable injury will flow to petitioners. In any event, in view of the strong public interest in adequately informing the public, and particularly teenagers, as to the health hazard involved in the cigarette habit which broadcast facilities are encouraging them to adopt and continue, we think that any injury to the affected industries is outweighed by the danger of irreparable injury to the public. Indeed, if our ruling will contribute to the avoidance of one untimely

³¹ As set forth in par. 43 above, we agree with the CBS position that licensee responsibilities under the Fairness Doctrine, in this as in other areas, should not be subject to *per se* guidelines, ratios or other rigid rules prescribed by the Commission. Accordingly, we would not undertake rule making to prescribe such standards in the absence of some compelling showing leading us to revise our present judgment (see paragraph 43) and to conclude that rule making in this particular area would be appropriate and would serve a useful purpose.

death, the public interest would not be served by any delay in its effectiveness.

60. In connection with this latter point, we have taken into account the further studies which have been undertaken since the Advisory Committee Report by persons competent in this field. Most important, of course, is the recent HEW Report of July 12, 1967 (already discussed in par. 33 and since confirmed and amplified in its Report of August , 1967). We shall therefore note here other pertinent studies. In February 1966 Dr. E. Cuyler Hammond's study for the National Cancer Institute made the first large scale survey of women cigarette smokers. His study showed that such women's death rate from heart disease and lung cancer were twice that of non-smokers.³² In May 1966 Dr. Green of Harvard University reported experiments with rabbits proving cigarette smoking can cause many lung and throat ailments.³³ Roswell Memorial Institute announced in August 1966 a report finding filter tips of several cigarette brands ineffective in screening out harmful tars and nicotine. This report acknowledged that some filters were better than others, but asserts
854 that none protects smokers.³⁴ A study by the Public Health Service and the American Cancer Society reported in October 1966 that a five year study of Seventh Day Adventists in California, comparing death rates of 11,071 male Adventists who do not smoke and the general male California population, showed one-sixth as many lung cancer deaths and one-third as many deaths from all respiratory diseases among Adventists as among the total male population.³⁵ Also in October 1966, a Louisiana State University five-year study, financed partly by the Tobacco Research Council, reported findings of a relationship be-

³² New York Times, February 23, 1966, 41:8.

³³ New York Times, May 2, 1966, 39:1.

³⁴ New York Times, August 30, 1966, 1:7.

³⁵ New York Times, October 12, 1966, 54:1.

tween cigarette smoking and hardening of the arteries in the heart.³⁶ Just recently, in a formal report to the President, it was stated by Dr. Kenneth M. Endicott, Chief of the National Cancer Institute, that "lung cancer—which will kill more than 50,000 Americans this year—can be brought under control because it is clearly caused by environmental factors—chiefly cigarettes." The President was also advised that "lung cancer has reached epidemic levels in men and may soon do so in women."³⁷

61. As stated in our ruling, of most serious concern to the Commission are statistics as to the correlative rise in cigarette consumption and teenage smoking. In January 1966 the Department of Agriculture in a public report entitled, "Tobacco Situation", announced that 1965 had been a record year for cigarette consumption.³⁸ The reason given by the Surgeon General for the increase was new smokers, not the increased use of tobacco by the then-current smokers.³⁹ In July 1966 Surgeon General Stewart reported, based on American Cancer Society and Public Health Service surveys, that one-half of American teenagers are regular smokers by age eighteen, despite two and one-half years of intensive educational efforts.⁴⁰ In October 1966 the Rand Youth Poll, conducted by the Youth Research Institute, released findings that teenagers smoke ten million cigarettes per week, that 53 percent of all 16-19 year olds are smokers, and that this represents a rise of 4 percent in this age group during the almost three year period since the Advisory Committee's Report.⁴¹ In November 1966 the American Cancer Society noted a six-year

³⁶ New York Times, October 22, 1966, 20:2.

³⁷ The Washington Post, July 22, 1967, 2:1.

³⁸ New York Times, January 2, 1966, IV, 7:1.

³⁹ New York Times, January 11, 1966, 9:1.

⁴⁰ New York Times, July 17, 1966, IV, 10:1.

⁴¹ Advertising Age, October 31, 1966.

study by Dr. E. Cuyler Hammond showing a marked drop in cigarette smoking among older people and a rise 855 in consumption by young people.⁴² In December 1966 the Agriculture Department announced that Americans had once again set a new record for total consumption of cigarettes per year.⁴³ In light of the statistics concerning teenage smoking, this increase in consumption appears correlated to the increase in population which occurs through the increase in youthful persons.

62. We wish to make it clear that this Commission is not the proper arbiter of the scientific and medical issue here involved and of course has not sought to resolve that issue. We have cited the reports in question because they establish (i) that here is a most substantial controversial issue of public importance, which must be fairly aired to the American people, and (ii) that because of the seriousness of the issue to the health of the people, a stay is patently inconsistent with the public interest. We recognize that there are countering efforts and arguments put forth particularly by the tobacco industry; there are also new and continuing developments in this field. See Hearings before the Consumer Subcommittee of the Senate Commerce Committee to review progress being made toward development and marketing of a less hazardous cigarette. We have not gone into detail on these matters, because they do not alter the two crucial findings set forth above.

63. As stated, this Commission agrees with the crucial point set forth in the concluding paragraph of the recent F.T.C. Report (see par. 34). In view of the Congressional action, the Government and private reports, we conclude that a stay of our action would be contrary to the public interest. Licensees must therefore abide by the ruling, or seek judicial review of it (see *Red Lion Broadcasting Company v. F.C.C. supra*). (Even in the event of such

⁴² New York Times, November 3, 1966, 41:1.

⁴³ New York Times, December 31, 1966, 4:6.

review, the ruling remains effective, absent entry of a Court stay.)

II *Conclusions*

64. There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" (§ 315(a)), is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the Legislative history of the Cigarette Labelling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it (except, of course, for whatever voluntary judgment the broadcasting industry might now make). But there is, we think, no question of the continuing obligation of a licensee
 856 who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.

65. In light of all the foregoing, we conclude and find:

- a. The ruling as to the applicability of the Fairness Doctrine to cigarette advertising is within the Commission's legal authority and discretion, and is in the public interest.

- b. Petitioners have made no showing which warrants reconsideration and withdrawal of the ruling or the institution of rule making in this area.
- c. Petitioners have made no showing that relief, except as indicated in par. 6 above, is warranted or in the public interest; on the contrary, the grant of stay relief would be likely to cause irreparable harm to the public.

ACCORDINGLY, IT IS ORDERED, That the petitions and requests for reconsideration, rule making, and stay listed in paragraph 1 of this Memorandum Opinion and Order ARE DENIED, except to the extent that relief is granted herein pending publication of this Memorandum Opinion and Order in the Federal Register.

IT IS FURTHER ORDERED, That copies of this Memorandum Opinion and Order SHALL BE MAILED to all broadcast licensees of the Commission.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Secretary

Attachment

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Appendix A

Background to 1965 Cigarette Labelling Act

1. On January 11, 1964 the Report of the Surgeon General's Advisory Committee concluded that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate. The Committee recommended that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." After the Report was issued, many groups private and public acted to provide this "remedial action."

* See attached statements of Commissioners Loevinger and Johnson.

(a) *The Tobacco and Broadcasting Industries*

2. Soon after the Advisory Committee's Report, the tobacco and broadcasting industries reacted with voluntary measures to control the content of cigarette advertising. In January 1964 the Television Code Review Board and the Television Board of Directors of the NAB recommended and approved specific amendments to the Television Code. The amendments prohibited some types of cigarette advertising directed at young people and health claims in cigarette advertising.¹ In June 1964 similar amendments were approved for the Radio Code.² These

Code amendments were motivated by the Advisory Committee's Report. In the words of the Television Code Review Board (Hearings, Senate Commerce Committee on S. 559 and S. 547, 89th Cong., 1st Sess., pt. 1, p. 591):

The board recognizes the burden of responsibility the report imposes on all television licensees in the area of cigarette advertising. Specifically, the board is concerned with the potential of cigarette advertising to give the false impression that cigarette smoking promotes health or physical well-being.

¹ *Television Code, Section IV, Program Standards, Paragraph 12:*

Care should be exercised so that cigarette smoking will not be depicted in a manner to impress the youth of our country as a desirable habit worthy of imitation.

Television Code, Section IX, General Advertising Standards, Paragraph 7:

The advertising of cigarettes should not be presented in a manner to convey the impression that cigarette smoking promotes health or is important to personal development of the youth of our country.

² *Radio Code I, Program Standards, Section H. 13:*

The use of cigarettes shall not be presented in a manner to impress the youth of our country that it is a desirable habit worthy of imitation in that it contributes to health, individual achievement, or social acceptance.

Radio Code, Advertising Standards, Section C (g):

The advertising of cigarettes shall not state or imply claims regarding health and shall not be presented in such a manner as to indicate to the youth of our country that the use of cigarettes contributes to individual achievement, personal acceptance, or is a habit worthy of imitation.

The Code Authority also made clear that regulation initiated by the cigarette manufacturers was what they envisaged. Thus the Authority provided that it would delay the issuance of general guidelines (interpreting the code amendments) which would assist advertisers and code subscribers in adhering to the television code restrictions, pending its determination of the implementation and effectiveness of the tobacco industry's self-regulation. *Id.*, at p. 592.

3. In April 1964 the major cigarette companies announced their agreement and adherence to a cigarette advertising code to impose standards and enforcement procedures for the self-regulation of cigarette advertising. The code provided advertising standards which would be applied by an independent administrator who would survey the advertising and labeling of cigarettes in the United States, with the power to levy fines for any advertising or labeling which does not conform to the industry code standards. These standards are basically of three types. The first prohibits many types of cigarette advertising specifically directed at persons under 21 years of age. Another prohibits health claims, except in certain limited circumstances. The third type prohibits suggestions that smoking is essential to social prominence, distinction, success, or sexual attraction. Robert B. Meyner, the former Governor of New Jersey, is the first and current administrator for the code. In evaluating the effect of the code on cigarette advertising, Mr. Meyner said in a Senate hearing (*id.*, at p. 568) that the character of cigarette advertising had been altered as a result of his enforcement of the code.³

³ However, we note the following exchange between Code Administrator Meyner and Senator Bass (*id.*, at p. 581):

"*Senator Bass:* * * * don't you believe that the industry itself, with you as the administrator, don't you believe that you are capable of protecting the health of the American public as far as advertising of cigarettes is concerned?

"*Code Administrator Meyner:* I think you describe a responsibility that is greater than is set forth in the code. As the code sets it forth, I am trying to accept that responsibility . . ."

859 (b) *HEW and Private Health Agencies*

4. The Department of Health, Education and Welfare (HEW) also took action after the Advisory Committee's Report. On February 18, 1964, the Surgeon General, Luther Terry, convened a meeting of four voluntary agencies to discuss with them and other health agencies means of implementing the recommendations contained in the Advisory Committee Report. This meeting eventually resulted in the establishment of the National Interagency Council on Smoking and Health on July 9, 1965. The purposes of the Council are threefold: "(1) to use its professional talents to bring to the nation—particularly the young—an increasing awareness of the health hazards of cigarette smoking, (2) to encourage, support and assist National, State and local smoking and health programs, and (3) to generate and coordinate public interest and action related to this area of health." The membership of the Council includes thirteen private agencies and three Federal Government agencies (United States Public Health Service, United States Office of Education, and United States Children's Bureau).

5. In 1964, the Public Health Service, which strongly endorsed the conclusions of the Advisory Committee's Report, awarded 10 grants and contracts to support demonstrations and projects to design effective methods of reaching various population groups with the facts about smoking. The comprehensive educational campaigns, however, which the Public Health Service desired to start had to await appropriations forthcoming from the 89th Congress. The President's Commission of Heart Disease, Cancer and Stroke recommended an appropriation of \$10 million to educate the public on the health hazards of smoking and to provide a network of control clinics to assist those who desire to give up smoking. Two million dollars were forthcoming in the fall of 1965.

(c) *The Federal Trade Commission*

6. As early as September, 1955 the Federal Trade Commission (FTC) had promulgated Cigarette Advertising Guides which, among other things, prohibited representations in cigarette advertising or labeling which refer to either the presence or absence of any physical effects from cigarette smoking, or which made unsubstantiated claims respecting nicotine, tars or other components of cigarette smoke, or which in any other respect contain implications concerning the health consequences of smoking cigarettes or any advertised brand (F.T.C. Ann. Rept., 1960, 860 p. 82). In 1960 the F.T.C. obtained agreement from leading cigarette manufacturers to eliminate unsubstantiated claims of nicotine and tar content (*Ibid.*).

7. Shortly after the issuance of the Advisory Committee's Report the F.T.C., on January 18, 1964, initiated a Trade Regulation rule making proceeding concerning the advertising and labeling of cigarettes. On June 22, 1964, after examining the advertising, labeling and other promotional practices in the cigarette industry, the F.T.C. concluded that cigarette manufacturers should be required to make an affirmative disclosure of the potential hazard from smoking in labeling and advertising (29 F.R. 8325). The basis for its conclusion was twofold. First, the F.T.C. found that the consensus of medical and scientific opinion was that cigarette smoking is a significant cause of certain grave diseases and contributes to the overall death rate. Second, the F.T.C. found that methods by which cigarettes had been and were being sold to the consuming public—by means of labeling and advertising which fails to disclose the health hazards of cigarette smoking—were deceptive and unfair to consumers under settled legal principles governing truth and fairness in advertising. The rule would have required that each cigarette package bear a warning statement by January 1, 1965. Also, if the warnings on the package together with such voluntary advertising reforms as the industry might have undertaken in

the interim, had failed to change the circumstances leading to the F.T.C.'s findings, the rule would have then required, in addition, warnings in all cigarette advertising by July 1, 1965.

8. On September 3, 1964, at the request of Chairman Harris of the House Commerce Committee, the F.T.C. extended the effective date of the rule for both packaging and advertising warnings to July 1, 1965 (29 F.R. 15570). Chairman Harris stated that he had requested such action because testimony which he had received during his Committee's Hearings in June and July, 1964 indicated that the validity of the trade regulation rule would be challenged in the courts, that judicial review could delay the enforcement of the labeling requirements for a considerable period of time, and that the enactment of legislation in this area by the Congress could very well eliminate this delay. The F.T.C. rule never went into effect because Congress enacted the Cigarette Labeling Act.

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**Concurring Opinion of Commissioner
Lee Loevinger**

In the Matter of Cigarette Advertising Ruling

. . .

I concur with great doubt and reluctance in the Commission ruling that broadcast licensees presenting cigarette advertising must also present warnings of the health hazards of cigarette smoking. I concur because the result seems to me to be socially and morally right. I have doubts that the action is procedurally and substantively consistent with controlling legal rules. I am reluctant because of concern that this action may represent a subjugation of judgment to sentiment. Briefly these are my views.

Cigarette smoking is a substantial hazard to the health of those who smoke which increases both with the number of cigarettes smoked and with the youthfulness when smok-

ing is started. Cigarette smoking increases both the likelihood of the occurrence and the seriousness of the consequences of various types of cancer, of cardiovascular failures and of numerous other pathologies of smokers. These conclusions are established by overwhelming scientific evidence, by the findings of government agencies, and by Congressional reports and statute. 15 USC sec. 1331 et seq. The evidence on this subject is not conclusive, but scientific evidence is never conclusive. All scientific conclusions are probabilistic. See Loevinger, *Science and Legal Thinking*, 25 Fed. Bar J. 153 (Spring 1965). Furthermore, law does not and cannot demand conclusive proof. Even in a capital case, the law requires only proof beyond a reasonable doubt. In an ordinary civil case or administrative proceeding a mere preponderance of the evidence is sufficient to carry the day. The evidence as to the dangers of cigarette smoking to the smoker is clearly beyond a mere preponderance and approaches proof beyond a reasonable doubt. This is the basic premise of my position, as well as of the Commission position despite a rather feeble disclaimer that the Commission is not passing judgment on this issue. (par. 62)

However, a burning conviction of good to be achieved or harm to be avoided neither establishes jurisdiction in a regulatory agency nor provides a sound legal guide to action. The instant proceeding illustrates the point.

The Commission here was so eager to take its present position that it acted on a complaint against CBS without giving notice to CBS, without affording CBS the opportunity to comment or submit a statement to the Commission directed to the issues under consideration, and without even bothering to secure or examine the text of the 862 advertisements in question. Surprising though it may seem to those unfamiliar with administrative agencies, the Commission was not aware of these irregularities at the time of the initial ruling, and how they occurred is more significant as a study of administrative

efficiency than as an issue of due process. It is enough to say that were the issue before us now merely the validity of the original letter to CBS these procedural defects would plainly invalidate the action.

However, what the Commission is doing now is issuing a prospective, legislative-type rule relating to cigarette advertising and broadcasting. CBS has been entirely exonerated from any imputation of unfairness in its broadcasting regarding cigarettes. That ends the proceeding so far as CBS is concerned; so the absence of due process in handling that complaint is no longer significant. In its present action the Commission is exercising its quasi-legislative authority to make a prospective rule. It is acting on the material that has been submitted to it since the original letter to CBS, so it has before it a variety of differing views from many interested parties. I think it would be preferable to have oral argument on the proposed rule to give the Commission the advantage of the interchange and confrontation between advocates of opposing views, and to permit the exploration of issues by direct questioning. But the refusal to hold such oral argument is not fatal and does not preclude legislative-type action.

Despite the reiterated certainty of the Commission opinion, doubts remain as to the legal authority of the Commission. Repetitious reference to the "public interest" as establishing whatever conclusion is contended for is no more than question-begging. The "public interest" is a judgment encompassing whatever the person making the judgment deems to be socially desirable. See dissenting opinion in *Regulation of CATV Systems*, 6 FCC2d 309, 330, at 335 et seq. (1967); Loevinger, *Regulation and Competition as Alternatives*, 11 *Antitrust Bulletin* 101, 129 et seq. (1966); Schubert, *The Public Interest* (1960). The Commission believes, and I concur, that it is socially desirable to discourage, rather than encourage, smoking by people, especially young people.

But the Commission has not been given a roving mandate by Congress to do whatever it may regard as socially desirable (i.e. "in the public interest"). On the contrary, it has been established by Congress with a limited jurisdiction and can act only within the power delegated to it by Congress, which means that it cannot act without some definite statutory basis.

The Commission opinion rests the present action on the Fairness Doctrine. This is a rule that broadcast licensees must afford reasonable opportunity for a discussion of conflicting views on issues of public importance. This principle was first developed on the basis of the statutory licensing power as to broadcasters, *Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949), and was recognized by reference in a 1959 amendment to section 315. 47 USC sec. 315. The context of both sources refers to "news" and the basic Commission opinion also refers to "commentary" and "discussion of public issues". Neither contains the slightest suggestion that the principle has anything to do with advertising, and that conclusion is most dubious.

Further, I am concerned that extension of the Fairness Doctrine to advertising is likely to lead either to its attenuation to the point of ineffectiveness or its broadening to a scope that is wholly unworkable. No matter what the Commission now says about the distinction between cigarette advertising and other types of advertising, it is establishing the principle that the Fairness Doctrine applies to commercial advertising, as distinguished from paid political broadcasting. The Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health. Contrary to the argument in the Commission opinion (par. 46), the "normal use" of automobiles does pose a health hazard, polluting the atmosphere to a degree that is dangerous not only to those using the automobiles but, even worse, in some localities to everyone, including infants and invalids. The Com-

mission will also find itself embarrassed when, as will surely happen, the cigarette companies demand time from some broadcaster who refuses to carry cigarette advertising but presents "public service messages" warning against the dangers of cigarette smoking. Having declared this to be a "controversial issue of public importance", the Commission will be bound to require that the viewpoints of those manufacturing and selling cigarettes are afforded access to broadcasting facilities.

The Commission opinion does contain findings that might support the result reached. Paragraph 37 finds that cigarette advertising expressly represents smoking as desirable and implicitly represents that it involves "relative safety" or "relatively little risk". This finding is corroborated by common experience and by scientific investigation. See Preston, *Logic and Illogic in the Advertising Process*, 44 *Journalism Q.* 231 (Summer 1967). In view of the clear weight of scientific evidence and official findings on this subject, this means that cigarette advertising constitutes both implicit misrepresentation and concealment of a material fact, if the health hazards are not disclosed by the seller. It is elementary law that the supplier of a chattel is bound to disclose its latent dangers to prospective users. *Restatement of the Law, Torts 2nd*, sec. 388. There is sound statutory and precedential authority for Commission action to prevent false representations on the broadcasting media. 18 USC sec. 1343; *KWK Radio, Inc.*, 34 FCC 1039 (1963), 111 AppDC 144, 337 F2d 540 (1964), cert. den. 380 US 910 (1965); *Loevinger, The Issues in Program Regulation*. 20 FCBA J 3 (1966).

864 The normal remedy for such misrepresentation or concealment would be either to forbid the advertising altogether or to require that it carry adequate disclosure of the material facts. There are two reasons precluding such Commission action. First, the Commission has no authority over advertisers as such. Second, the 1965 Cigarette Labeling Act apparently forbids such action.

The first reason is easily surmounted. The Commission has held that a broadcast licensee must take reasonable measures to prevent the use of his licensed facilities for public deception. *KWK Radio, Inc., supra*. The application of this principle to the present situation suggests a means of achieving the result reached here within the limits of statutory authority and without doing violence to the Fairness Doctrine. The second reason is more difficult.

The Commission opinion recognizes the Cigarette Labeling Act as a substantial argument against the present action, since it devotes a large part of the discussion to it. (pars. 15 through 35 and Appendix A). By reading the terms of the Act very literally and the presumed purposes of the Act very loosely, the opinion concludes that the present ruling is not precluded by the Act but rather implements the policy of the Act. The opinion offers a mass of detail in support of this conclusion, but a review of the relevant points casts some doubt. In several messages to Congress prior to passage of legislation on this subject and during consideration of such legislation, the FCC stated that its authority is limited to the broadcasting field and that it believed that cigarette advertising should be regulated on a "broad, across-the-board basis". (par. 31). After receiving several such messages from the Commission, Congress in 1965 passed an act expressly stating: "It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, * * *" 15 USC sec. 1331. This was clearly the "broad, across-the-board" regulation which the FCC had suggested, and Congress surely was warranted in assuming that the FCC would not undertake to exercise its limited jurisdiction in a "piecemeal" attack upon the problem.

Nevertheless, the Commission opinion argues that FCC action is not precluded for several reasons. The opinion says that conditions have changed because the FTC is not

undertaking the comprehensive regulatory plan which it formerly proposed. (par. 32). But the reason for this is that the FTC plan was expressly forbidden by statute, and thus the only change in circumstance is the passage of the statute which limits, rather than extends, administrative authority to act in the field. The opinion also concludes that the terms of the Cigarette Labeling Act do not prohibit the present ruling because the Act refers only to statements made "in advertising" and not to statements made "because of the advertising" of cigarettes. (par. 16a, 23). However, the Act prescribes the form of health warning that is required on cigarette packages and explicitly provides that no other statement relating to health and smoking shall be required on cigarette packages or in cigarette advertising. If the Act is read as literally as the Commission opinion construes it, then it does not preclude the total prohibition of cigarette advertising, either altogether or in the broadcasting media. The opinion states that this would be inconsistent with the Act (par. 15) although there is no specific provision of the Act relating to this, any more than there is a specific provision relating to statements to be required "because of" cigarette advertising. The Commission opinion does not explain why the Act is construed to permit one remedy but not another for misleading advertising, when neither is explicitly covered. Despite the profusion of detail and the length of the discussion the opinion does not come to grips with the issue posed by the Cigarette Labeling Act. The real reason for the Commission's present action is that during the last several years the Commission has changed its "policy"—that is, its collective opinion—on this subject and now believes that it should take whatever action it can take to combat the health hazard of smoking, especially by young people who are likely to be influenced by the broadcast media.

It seems to me that the construction of the Cigarette Labeling Act attempted in the Commission opinion is

strained and unconvincing. However, the basic difficulty is that Congress was obviously ambivalent on this subject and that there is no unequivocally clear Congressional intent to be derived from the Act or its history. It was a compromise between conflicting viewpoints which still have spokesmen who are heard in Congress.

I am as persuaded as the Commission majority and its draftsmen that cigarette smoking is hazardous and injurious to the health of smokers and extremely hazardous and injurious to the health of those who start smoking while young. Therefore I think it desirable that all legal and practical steps be taken to discourage smoking. I have serious doubts that the action taken now by the Commission is legally sound or practically effective. I think that if we spent less effort and space in proclaiming the righteousness of our purposes and objectives and more in careful and rigorous analysis of our procedures and of our legal jurisdiction and authority, and attempted greater specification of the scope and application of our ruling, we would be more convincing and more effective.

866 Consequently, I am reluctant to concur because this ruling seems to be the result of sentiment rather than conviction. It is based on a strong feeling that the public, especially the younger members of the public, should be protected against enticement to smoke cigarettes, rather than upon a well reasoned conclusion that this is an effective means of achieving that objective and that this ruling is soundly based on legal authority. My opinion cannot change the result, so all I can do is indicate the difficulties I see in this approach to the subject and the reasons that I have doubts, while confessing candidly that I put doubts aside and join, albeit reluctantly, in voting for the ruling here because of a strong feeling that suggesting cigarette smoking to young people, in the light of present knowledge, is something very close to wickedness.

867

Fairness and Cigarette Advertising

[In the Matter of Television Station WCBS-TV. . . .]

Concurring Opinion of Commissioner Nicholas Johnson

I join the Commission's decision to apply the Fairness Doctrine to the use of television and radio broadcasting to promote cigarette smoking. In view of Commissioner Loevinger's concurring opinion, however, I believe some brief remarks are appropriate.

With admirable honesty, Commissioner Loevinger has confessed to "doubts and reluctance" about our cigarette ruling. The issues he raises are provocative and significant. They touch on concerns which are, I believe, widely shared by members of the public. They inspire qualms about a case of landmark importance. I consider these doubts unwarranted.

Commissioner Loevinger does not state flatly that he thinks the ruling unlawful. But he does cast grave doubt on its validity, for his dismissal of a number of arguments against the Commission's position displays something less than full enthusiasm. For this reason, I feel obligated to set forth the simple logic behind my support for the decision.

The decision takes as its major premise a factual assertion which is so trivial as to be beyond cavil. Advertising messages are part—an important and substantial
868 part—of the information put before the public by television and radio broadcasting. Roughly one-third of radio's hour is spot commercials. As such, advertising messages should no more be granted automatic immunity from considerations of fairness than any other category of advocacy. If an advertisement takes a position on an issue that is "controversial" and of "public importance" then fairness—whether as a matter of Section 315, FCC regulations, or common decency—requires that an opportunity be granted to ventilate opposing views. Com-

munications Act of 1934, as amended, 47 U.S.C. § 315(a)(4) (1964). Federal Communications Commission, Public Notice, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964).

The Commission's minor premise seems equally hard to question. The issue of whether people ought to smoke cigarettes is a "controversial" issue, and it is one of "public importance." It has been recognized as such by Congress, the Executive Branch, the Federal Trade Commission as well as the FCC, the scientific and educational community, and the mass media. Millions of Americans smoke. Commissioner Loevinger agrees with the by now quite impressive evidence that they thereby incur grave risks of impairing their health and shortening their lives.

869 Broadcasters licensed by this Commission to serve the public interest devote significant amounts of their prime time to encouraging Americans to incur those risks. Given this set of circumstances, it is the minimum obligation of this Commission to see to it that a fair opportunity exists to present the other view: the warnings of those responsible citizens who believe cigarette smoking to be a dangerous and insidious habit.

Commissioner Loevinger does not explicitly dispute this line of reasoning. But he cautions against such an interpretation of the Fairness Doctrine by advancing what lawyers call a "slippery slope" argument. If the Commission brands cigarette advertisements controversial issues of public importance, he says, virtually all advertising will be covered by the logic of that decision. No one will know where to draw the line. Now, it is certainly true that it is no easy matter to decide what is and what is not a controversial issue of public importance. But that difficulty is one with which the Commission must live, *whenever* it confronts a fairness case. The fact that this particular case happens to involve paid commercial announcements does not make it unique in that respect. The slippery

slope argument states, in essence, that the logic of this decision, however justified on the facts before us, could be extended to other, more questionable, cases. Of course, this is right. This decision *could* be extended to
 870 other situations. But the fact is that all the hypothetical cases brandished by Commissioner Loevinger *are* more questionable than this one. By drawing the line at cigarette advertising we have framed a distinction fully as sound and durable as those in thousands of other rules laid down by courts every day since the common law system began.

Finally, Commissioner Loevinger broaches the argument that Congress may have intended to preclude FCC regulation of cigarette advertising when it passed the Cigarette Labeling Act. With all respect, I consider such a sweeping interpretation of that statute (which Commissioner Loevinger himself seems disinclined to accept) altogether misguided. It seems to me to reflect a very limited view of the relationship between particular Congressional actions and administrative agencies charged with enforcing established public policies of great significance.

This Commission has few, if any, responsibilities to the people of America greater than its duty to ensure that its licensees act consistently with the dictates of the Fairness Doctrine. That doctrine ensures that the most powerful medium of mass communication in our society does not stifle competition in the market place of ideas. Had the Congress and this Commission not written this doctrine into statutory and regulatory prescription, early in
 871 the history of the Communications Act of 1934, the Supreme Court might well have felt obligated to make the requirements of fairness a matter of constitutional law. For fairness plainly deals with issues of constitutional dimension.

In view of the stature of the Fairness Doctrine, we would be underestimating our obligations as members of this

Commission if we concluded that the Cigarette Labeling Act tied our hands in the present case. I agree with the Commission that our action here is entirely consistent with the regulatory design created by that Act. But even if I shared Commissioner Loevinger's conclusion that the Act is ambiguous, it would not alter my view of this issue. Elemental principles of public law dictate that forces within the legislature cannot override a major national policy, unless they persuade a majority of the legislature to inhibit the application of that policy with clarity if not explicitly. In plain political terms, if there was "ambivalence" it means that a majority of Congress did *not* state an intention to immunize the advocacy of cigarette smoking from the requirements of the Fairness Doctrine. Thus, the Commission's obligation to apply that doctrine according to its inherent logic remains in force.

In conclusion, I would like briefly to express my personal regret at the seeming reluctance of some broad-
 872 casters to accept the spirit of the fairness doctrine and this ruling. There is no social force more powerful than broadcasting today. If popular support is to be sustained for industry programming relatively unfettered by governmental restraint—which I encourage—the broadcasters must not only act responsibly but appear to act responsibly. Nothing contributes more to the appearance as well as the reality of responsible broadcasting than the Fairness Doctrine, and the FCC's enforcement of that doctrine. The broadcaster need not withstand alone both the charge that he has been unfair and that he has been unilaterally irresponsible in the self-evaluation of others' charges of his unfairness. He can point to the FCC, its procedures for evaluating such complaints, and its judgments on his behalf. Indeed, if the Fairness Doctrine and procedures did not exist I would think the broadcasters would be the first to urge their creation.

Note that, for a variety of reasons, the FCC has not banned cigarette advertising from broadcasting. Our ac-

tion today simply requires broadcasters—public licensees charged with operating “in the public interest”—to afford opportunity for fair response to the appeals of cigarette commercials. It is a mild form of regulation. It will have little, if any, impact on the advertising revenues of station owners and networks. It will increase the amount of public service time for which they may take credit.

873 Unfortunately, it will probably also do little to brake the still-climbing rate of cigarette consumption by Americans, especially our young people—who see, on the average, at least one television program every day sustained by commercials associating cigarette smoking with adulthood and other goals of youth. FTC Commissioner Elman has estimated that some 300,000 Americans die prematurely each year because of their affection for cigarettes. Given these facts I should think broadcasters would want to give far more serious consideration than they have to a voluntary ban on the carriage of cigarette advertisements.

For, once again, it is the appearance as well as the reality that moves men's souls. And, unfortunately from the standpoint of the broadcasters' relations with their public, broadcasting's encouragement of cigarette consumption is an issue wrapped in profits as well as propriety—indeed, roughly \$200 million of advertising revenues a year. For, whether or not the judgment be warranted, association with profitable enterprise dependent upon the promotion of disease, death, dismemberment or degradation of one's fellow man—especially children—has historically been viewed in most human societies with even less charity than the senseless criminal act which produces the same end.

It is true that \$200 million is not an insignificant
874 amount of money voluntarily to forego. But, especially if its loss is ultimately inevitable anyway, it may be far cheaper in the long run to gain the goodwill of voluntary forbearance than to risk forever tainting the good name of American broadcasting.

882

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

FCC 67-1074
5284

September 21, 1967

IN REPLY REFER TO:
3300

Mr. Thomas J. Dougherty
Assistant Secretary
Metromedia, Inc.
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016

In re: Applicability of the Fairness Doctrine to
Cigarette Advertising (RM-1170)

Dear Mr. Dougherty:

This is in response to your letter of September 15, 1967, seeking clarification of one aspect of the Commission's recent ruling on the applicability of the Fairness Doctrine to cigarette advertising (FCC 67-1029). Specifically, you inquire whether the presentation of health hazard programming, in line with the Commission's ruling, in turn gives rise to an obligation to afford time to the viewpoint of spokesmen for the cigarette advertisers to rebut such programming, and in this connection request clarification of paragraph 38 of our September 8 ruling, and specifically the following sentence: "The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials."

In accordance with your request, we shall clarify this matter. The sentence quoted in your letter states our position inaptly and is withdrawn.

In the Editorializing Report, 13 FCC 1246, 1249, where the Fairness Doctrine is spelled out, we pointed out the licensees should devote a reasonable amount of time to the discussion of controversial issues of public importance to their area. Thus, tobacco organizations are, and have always been, free to approach broadcast licensees to purchase regular programming time or suggest sustaining roundtable or other programs to deal intensively with the issue of smoking and health, on the ground that it is one of importance to the licensee's area. Whether such
 883 time is to be afforded is a matter within the discretion and judgment of the licensee, as in the case of other similar programming judgments.

Your inquiry assumes that cigarette companies have purchased time on a station to present their commercials. We have held that these portray the use of the particular cigarette as attractive and enjoyable and encourage people to smoke. We said (para. 37):

The June 30, 1967 F.T.C. Report amply documents its conclusion that cigarette commercials today still contain the two principal elements it found to exist in 1964—a portrayal of the desirability of smoking and assurances of the relative safety of smoking (pp. 15-16). The F.T.C. states that desirability is portrayed in terms of the satisfactions engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences and that by so doing the impression is conveyed that smoking carries relatively little risk (ibid.) . . .

A licensee may choose to present regular programming dealing with the cigarette smoking issue, (e.g., roundtable discussions or documentaries), in discharge of its fairness obligation. See para. 42, FCC 67-1029. But in view of the above, it follows that whatever way is chosen (i.e., regular programming or health hazard announcements), a

licensee who has carried cigarette commercials has extensively covered one side of the issue on behalf of the cigarette companies, so that when he presents a significant amount of time devoted to the other side (see our June 2 ruling and paras. 43 and 50 of our September 8 ruling), he is under no obligation to present further materials on the first (pro-smoking) side requested by these companies or their spokesmen in your assumed case. Rather, in the circumstances, whether time is afforded for the presentation of such additional material by these companies is a matter within the discretion of the licensee in determining whether further discussion of the "pros and cons" of this issue is called for.

884 We hope that the foregoing general material clarifies this matter and will be helpful to you. Any specific ruling would of course be made only in the context of a particular factual situation.

BY DIRECTION OF THE COMMISSION
BEN F. WAPLE
Secretary

CONCURRING STATEMENT OF COMMISSIONER LEE LOEVINGER

I concur in deletion of some inapt and unfortunate language from the Commission opinion of September 13, 1967, regarding cigarette advertising. However, since the Commission opinion is confused, ambiguous, loosely reasoned and certain to engender difficulties, as stated in my concurring opinion of that date, I think it would be preferable to withdraw the Commission opinion and issue one less prolix and logically more rigorous to deal with this subject.

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THE TOBACCO INSTITUTE, INC.
1735 K STREET, N. W.
WASHINGTON, D. C. 20006

296-8434

October 20, 1967

Secretary
Federal Communications
Commission
Washington, D. C. 20554

Re: RM-1170: Petition for Reconsideration of Commission Action Released September 22, 1967

Dear Sir:

Pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, The Tobacco Institute, Inc., respectfully requests the Commission to reconsider, and on reconsideration to vacate, its action of September 21, 1967 (FCC 67-1074), which was the subject of a Public Notice of September 22, 1967, and was published in the Federal Register of September 30, 1967 (32 Fed. Reg. 13737), in which the Commission purported to "clarify" its Memorandum Opinion and Order in this proceeding (RM-1170) by withdrawing therefrom the following sentence:

"The Fairness Doctrine affords an avenue of presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials."

The Commission thus reversed its position and ruled that the presentation of programming asserting a health
890 hazard in cigarette smoking does not impose any corresponding obligation upon licensees to accord time for rebuttal of that viewpoint.

Interests of Petitioner

The Tobacco Institute, Inc., a New York membership corporation, is a voluntary association of United States manufacturers of tobacco products, including domestic manufacturers of cigarettes for public sale. It submits this Petition in its own behalf and in a representative capacity in behalf of its members.¹ The Institute was a participant in the earlier stages of this proceeding (RM-1170).

The Institute itself and each member of the Institute is a "person aggrieved or whose interests are adversely affected by" the Commission's ruling in the present matter,² and each is "likely to be financially injured" thereby.³ The effect of the Commission's ruling is to permit radio and television stations to present programming asserting that cigarette smoking may be hazardous to health without presenting the opposing viewpoint. The ruling may have an adverse effect on the sale of cigarettes produced and sold by members of the Institute. In addition, since the ruling affects the public controversy over whether smoking may be hazardous to health, it necessarily affects the interests of the Institute and its members.

¹ The Institute has standing to challenge the Commission's ruling. See *National Motor Freight Traffic Association, Inc. v. United States*, 372 U.S. 246, 247 (1963) (upholding trade association's standing to challenge ICC order affecting its members); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (upholding Pharmaceutical Manufacturers Association's right to obtain preenforcement review of FDA order). The standing issue in the latter case is more fully discussed in the District Court's opinion, *Abbott Laboratories v. Celebrezze*, 228 F. Supp. 855, 860-61 (D. Del. 1964).

² Communications Act of 1934, § 405, 47 U.S.C. § 405; FCC Rules and Regulations, § 1.106(b).

³ *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 477 (1940); *Philco Corp. v. FCC*, 257 F. 2d 656, 658-59 (D.C. Cir. 1958); *Metropolitan Television Co. v. United States*, 221 F. 2d 879, 880 (D.C. Cir. 1955). See also *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

II

Reasons for Granting the Petition

While the Commission's ruling purports merely to "clarify" its Memorandum Opinion and Order, the ruling actually makes a major substantive change in that Order. As adopted, released, and published by the Commission, that Memorandum Opinion and Order stated that licensees were required to present "the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claim made in opposition to cigarette commercials." The Commission has now reversed that part of its ruling.

This new ruling of the Commission was made without any interested person's having been given the opportunity to comment on the matter. The ruling was made in response to a letter from an individual broadcaster, and no one other than that broadcaster had any prior notice, or indeed any notice whatever, that a Commission *volte face* was in the offing. Petitioner submits that it is unlawful and administratively improper for this Commission to take this action—which vitally affects the industries concerned—in this offhand manner and particularly after petitions for judicial review had been filed. The ruling must be vacated in order that the Commission may receive the comments and views of all interested persons on this matter.

The Commission's determination that cigarette commercials contain health claims has no factual or legal basis. In any event, no basis exists for concluding that all cigarette commercials contain health claims either with respect to cigarette smoking in general or with respect to smoking the particular brand advertised. Whatever claims are made in cigarette commercials in general or in any particular commercial is a factual question that cannot validly be resolved by the Commission on the

basis of unsupported conclusionary statements such as those contained in its Memorandum Opinion and Order and in the modification here concerned.

In addition, since the Commission has ruled that the smoking and health question is a controversial issue of public importance within the meaning of the Fairness Doctrine, a licensee broadcasting asserted health hazard claims must present the differing views on this controversial issue of public importance, whether or not the licensee broadcasts cigarette commercials. The Commission erred in ruling to the contrary.

III

Conclusion

For the foregoing reasons, petitioner respectfully submits that this Petition should be granted and that the Commission's ruling should be vacated.

Respectfully submitted,

THE TOBACCO INSTITUTE, INC.

1735 K Street, N.W.

Washington, D.C.

By /s/ FRANKLIN B. DRYDEN
Franklin B. Dryden

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VERIFICATION

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss.

FRANKLIN B. DRYDEN, being first duly sworn, deposes and says that he is an official of The Tobacco Institute, Inc.; that he has read the foregoing Petition for Reconsideration and knows the contents thereof; and that he verily believes the facts stated therein to be true.

/s/ FRANKLIN B. DRYDEN

Subscribed and sworn to before me this 20 day of October, 1967.

/s/ ROGER E. SHELLY
Notary Public

My Commmission Expires:
Mar. 31, 1968

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

The Tobacco Institute, Inc.
1735 K Street, N.W.
Washington, D. C. 20006

Attention: Mr. Franklin Dryden

Dear Mr. Dryden:

This is in response to your letter of October 20, 1967, petitioning for reconsideration of the Commission's letter of September 22, 1967 to Metromedia, Inc. (FCC 67-1074), in response to Metromedia's request for clarification of the Commission's Memorandum Opinion and Order of September 8, 1967 (FCC 67-1029) on the applicability of the Fairness Doctrine to cigarette advertising. Metromedia had inquired whether the presentation of health hazard pro-

gramming, in line with the Commission's ruling, in turn gave rise to an obligation to afford time to the viewpoint of spokesmen for the cigarette advertisers to rebut such programming.¹ The Commission's letter to Metromedia clarified the matter by stating, in essence, that " . . . a licensee who has carried cigarette commercials has extensively covered one side of the issue on behalf of the cigarette companies, so that when he presents a significant amount of time devoted to the other side (see our June 2 ruling and paras. 43 and 50 of our September 8 ruling), he is under no obligation to present further materials on the first (pro-smoking) side requested by these companies or their spokesman in your assumed case."

Asserting that the Commission's letter (FCC 76-1074) represented a "major substantive change" in the September 8th Order, rather than a clarification, you claim that all interested parties should have been notified and given an opportunity to present their views. You also assert that there is no basis for the Commission's decision that cigarette commercials contain health claims, and further that stations which carry health hazard claims and no cigarette advertising are obliged to present pro-smoking material.

897 Notwithstanding your contention, we believe that our letter to Metromedia did not constitute the type of action for which prior notice and an opportunity to comment was necessary or warranted. There was no complaint submitted in this matter nor any case or controversy before the Commission for determination, but simply a request by Metromedia for an explanation as to the intended meaning of one paragraph in our September 8th opinion. Nothing in the Commission's rules or in its procedures as to complaints under the "Fairness Doctrine"

¹ In requesting clarification Metromedia pointed specifically to a sentence in para. 38 of the September 8th Memorandum Opinion and Order, and the Commission withdrew that sentence for the reason that it "states our position inaptly."

requires that public notice be given prior to answering a request for clarification. In any event, our September 22nd letter to Metromedia was less than 30 days after our Memorandum Opinion and Order of September 8th, and therefore within the time period for reconsideration on the Commission's own motion. Public Notice of the letter was given (32 F.R. 13737), and any interested person could properly seek reconsideration of the substance of our letter.

With respect to your substantive objections, the contention that cigarette commercials do not make any health claim was fully treated in our September 8th Memorandum Opinion and Order and in the September 22nd letter to Metromedia. We think further comment is unnecessary.

The hypothetical situation of a station which presents health hazard claims but no cigarette commercials obviously raises a factor different from that considered in our response to Metromedia, whose inquiry assumed that cigarette commercials had been carried. Whether time must be afforded in the hypothetical circumstances you suggest is a matter which would be governed by the same principles as are applicable generally under the "Fairness Doctrine."

In sum, we think that your letter does not present any arguments which warrant reconsideration of the letter to Metromedia. Accordingly, your request for reconsideration is denied.

BY DIRECTION OF THE COMMISSION

BEN F. WAPLE
Secretary

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,525, 21,526

WTRF-TV, INC., AND NATIONAL ASSOCIATION OF
BROADCASTERS, *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED
STATES OF AMERICA, *Respondents.*

Prehearing Stipulation

I. Counsel for the parties stipulate that the following issues are presented by the petitions for review in these proceedings:

The Federal Communications Commission has ruled that radio and television stations that broadcast any cigarette commercials must broadcast on a regular basis material presenting the viewpoint that cigarette smoking may be a hazard to the smoker's health. The issues presented by this ruling are:

1. Whether this ruling is precluded by reason of the Federal Cigarette Labeling and Advertising Act and the congressional purposes and findings that underlie this statute.
2. Whether the Commission's ruling contravenes the First, Fifth or Ninth Amendments to the Constitution.
3. Whether this ruling is in excess of the Commission's statutory authority, constitutes an abuse of discretion, is arbitrary or capricious or is otherwise unlawful.
4. Whether, in adopting this ruling, the Commission observed the procedures required by law.
5. Whether, if the ruling is otherwise valid, the Commission erred in ruling further that licensees who broad-

cast cigarette commercials and who grant a significant amount of time to spokesmen for the view that smoking may be hazardous are not obligated to grant reply time to cigarette manufacturers.

II. Respondents reserve the right to argue that certain of the matters raised by the above issues are barred from consideration by this Court under Section 405 of the Communications Act because not presented to the Commission.

III. Counsel for the parties further stipulate that:

1. Within three days after the filing of respondents' brief, petitioners and intervenors in support of petitioners shall serve and file with the Clerk statements of the parts of the record they propose to print in the Joint Appendix.

2. Within five days after the filing of the above statements, respondents and intervenors in support of respondents shall serve and file a statement of the parts of the record which they desire to have printed in the Joint Appendix and which are not included in the statements filed pursuant to paragraph 1 above.

3. The Joint Appendix shall be filed at the same time as the reply briefs are filed, or in the event no reply brief is filed, within fifteen days after the filing of respondents' brief.

4. In preparing the briefs, the parties shall, when referring to record material, indicate the page, or pages, in the original record where such material may be found. The pages of the Joint Appendix shall be consecutively numbered and shall, in addition, bear appropriate record page numbers, so that the reference to the record material printed in the Joint Appendix may be found.

[Signatures of counsel omitted]

Jan. 5, 1968

[Filed Jan. 19, 1968]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1967

No. 21,525 & 21,526

WTRF-TV, INC., AND NATIONAL ASSOCIATION OF
BROADCASTERS, *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED
STATES OF AMERICA, *Respondents*.

Before: Burger, Circuit Judge, in Chambers.

Prehearing Order

Counsel for the parties in the above-entitled cases having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in these cases unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

BRIEF FOR PETITIONER

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

JOHN F. BANZHAF III,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

THE TOBACCO INSTITUTE, INC., et al.,
Intervenors.

No. 21285

waits

FILED

FEB 24 1968

John F. Banzhaf III

Petition to Review

An Order Of

The Federal Communications Commission

John F. Banzhaf III
1368 Metropolitan Ave.
New York, N.Y. 10462

STATEMENT OF QUESTION PRESENTED

Assuming the correctness of the Commission's ruling that the fairness doctrine applies to cigarette advertisements and that broadcasters must therefore present countervailing messages about the health hazards of smoking, did the Commission nevertheless err as a matter of fact and/or law in holding that the time devoted to such countervailing messages need not be substantially equal to the time devoted to cigarette advertisements but must instead merely be "substantial?"

TITLE PAGE

JOHN F. BANZHAF III,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and UNITED STATES OF AMERICA,

Respondents.

THE TOBACCO INSTITUTE, INC., AMERICAN TOBACCO CO.

BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER

CO., LIGGETT & MYERS TOBACCO CO., PHILLIP MORRIS

INC., R.J. REYNOLDS TOBACCO CO, UNITED STATES

TOBACCO CO., and P. LORILLARD CO.,

Intervenors.

No. 21285

CONSOLIDATED FOR ALL PURPOSES WITH:

WTRF-TV, INC., and NATIONAL ASSOCIATION OF
BROADCASTERS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and UNITED STATES OF AMERICA,

Respondents.

SPARTAN RADIOCASTING CO., PALMETTO RADIO CORP.,

W.A.V.E., INC., WFIE, INC., WFRV, INC., INDIANA

BROADCASTING CORP., GULF TELEVISION CORP., CORIN-

THIAN TELEVISION CORP., GREAT WESTERN BROADCASTING

CORP. COLUMBIA BROADCASTING SYSTEM, INC., HEART

DISEASE RESEARCH FOUNDATION, WLLE, INC., AMERICAN

BROADCASTING COMPANIES, INC., NATIONAL BROADCAST-

ING COMPANY, INC., THE TOBACCO INSTITUTE, INC.,

AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO

CORP., LARUS & BROTHER CO., LIGGETT & MYERS TOBAC-

CO CO., PHILLIP MORRIS INC., R.J. REYNOLDS TOBACCO

CO., UNITED STATES TOBACCO CO., and P. LORILLARD

CO.; JOHN F. BANZHAF III,

Intervenors.

No. 21525-6

THE TOBACCO INSTITUTE, INC., AMERICAN TOBACCO CO.,

BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER

CO., LIGGETT & MYERS TOBACCO CO., PHILLIP MORRIS

INC., R.J. REYNOLDS TOBACCO CO., UNITED STATES

TOBACCO CO., and P. LORILLARD CO.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and UNITED STATES OF AMERICA,

Respondents.

No. 21577

JURISDICTIONAL STATEMENT

This is an action to review an order of the Federal Communications Commission. This court has jurisdiction under 47 U.S.C. § 402(a), 28 U.S.C. § 2342, and 28 U.S.C. § 2112.

STATEMENT OF CASE

In response to petitioner's complaint, the Commission ruled that the fairness doctrine applies to cigarette advertisements and that broadcasters must devote time to presenting the other side of this controversial issue of public importance. However, the Commission expressly ruled, both in its initial decision and in its later refusal to reconsider, that the application of the doctrine to cigarette advertisements does not require that the time devoted to the other side of the issue be substantially equal to that devoted to the cigarette advertisements but may instead merely be substantial.

SUMMARY OF ARGUMENT

I. The rationale and public policy underlying the fairness doctrine can be satisfied with respect to the issue of smoking only if the time required to be devoted to anti-smoking discussions is substantially equal to that devoted to cigarette advertising.

II. Furthermore the subject matter and method of presentation of the pro-smoking material makes a "substantially equal time"

rule practical and easily observed and enforced although it might not be for many other fairness doctrine issues.

III. The overwhelming public importance of the smoking issue, both in terms of the individual and of society as a whole, requires that trustees of this vital public resource (the airwaves) adhere to and observe higher standards of conduct than with other fairness doctrine issues.

ARGUMENT

I. The rationale and public policy underlying the fairness doctrine is that with respect to issues of extreme public interest and importance the public must be informed so that each member may be able to make an informed decision. For a number of reasons this objective can be achieved with respect to the issue of cigarette smoking only if substantially equal time is devoted to both sides of the issue.

Of critical importance is the nature of the audience which appears to be most seriously effected by the competing discussions of the issue. Unlike most fairness doctrine issues which are addressed to and of principal importance to mature adults who will make their decisions in their roles as citizens and voters, this issue of whether or not to smoke is of particular importance to youngsters, some 4000 of whom take up the habit every day. Unlike adults, most youngsters are not regular readers of newspapers

or news magazines and a great number depend on radio and T.V. as their primary source of information and news. Thus, since the audience most seriously effected by the discussions of the smoking issue rely so havily on the broadcast medium for information, the burden to present the other side of the issue is correspondingly increased.

A second important factor is the nature of the appeals being made. Unlike most fairness doctrine issues, the problem here is that appeals will be made and decisions reached primarily on the basis of emotional factors. Cigarettes are sold not be a factual discussion of their advantages but rather by associating them with favorable emotional images. Thus the problem is not one of assuring that youngsters "know" each important fact about the health hazards but rather that these facts be presented effectively and forcefully to them over a medium capable of competing with the audio and visual images created by broadcast advertisements. This cannot be accomplished where there is a large preponderance of one view but can only be achieved where both sides have equal access to the two most effective means of persuasion in this area; radio and television.

A third important factor is the mental processes of the audience most seriously effected by cigarette commercials. Children are less capable than adults of distinguishing fact from invention and image from reality; they are also less capable of resisting

appeals made on an emotional level. For these reasons they are more apt to be persuaded by the mere act of repetition and to reach decisions on the quantity rather than on the merits of the competing discussions. For all of these reasons a requirement of anything less than substantially equal time will not serve the public policy underlying the fairness doctrine nor satisfy the public interest, convenience, and necessity which the Commission is required to enforce.

II. Unlike the situation with respect to most other issues, the application of the fairness doctrine to the issue of smoking permits the application, observation, and principled enforcement of a "substantially equal time" rule. Thus, although such a rule may not be practical or workable with respect to many other issues, these problems should not be used as arguments against its application where it is so clearly called for.

One reason why a "substantially equal time" rule is difficult to apply to many fairness doctrine issues is the problem of measuring the time devoted to the discussion of each side. For example a T.V. documentary on slums presents many minutes of on-the-scene motion pictures without narration, or the coverage of a press conference may include questions or comments from the floor which detract from the speaker's presentation. In each case it would be difficult to determine how much time was devoted to a "discussion"

of the controversial issue. However, in the case of cigarette advertisements, it may be safely presumed that every second of broadcast time which the sponsor pays for and has complete control over is being used to put his message across as forcefully as possible.

Another problem with applying a "substantially equal time" rule to many fairness doctrine issues is the problem of gauging the intensity of discussion on each side. If one assumes that an unnarrated T.V. picture of slum conditions or children suffering from hunger is a "discussion" of one side of an issue (which would also presumably be the case with any staged dramatization), is it more or less effective than an equal amount of time devoted to a debate or a prepared spoken presentation? With respect to the issue of smoking this problem is not present because it may safely be assumed that each side will plan its presentation for maximum effectiveness within the time spot allotted, using whatever method of presentation it finds most effective.

A final argument often used against a "substantially equal time" rule is the difficulty of maintaining the appropriate records. However, cigarette advertisements are already required to be noted in a station's log and are also recorded in its financial records. Thus either the station itself or the Commission could easily determine the time allotted to each side of the issue. In summary then, the major arguments which have usually been used against a "substantially equal time" rule do not apply to the issue

of smoking. Other decisions should therefore not be viewed as precedent to the contrary.

III. The issue of whether or not to smoke is immeasurably more important than almost all other fairness doctrine issues because the decision which will be made by each viewer or listener directly involves the likelihood of death and/or disability. From an individual standpoint it may literally be a life and death decision; from the point of view of society uninformed decisions currently give rise to the greatest health hazard in the country today and result in untold losses in terms of time, money, productivity, and lives. Broadcast licensees are trustees of a very valuable public resource which they are required to operate in the public interest. A trustee of a minor who took advantage of this trust relationship to persuade the minor to ingest a dangerous and harmful substance would not doubt be stripped of his trust if not placed in jail because of the very high duty and standard of care he owes to his ward. Trustees of the radio and T.V. spectrum owe their beneficiaries the same high duty and standard of care; if there is any doubt as to whether viewers are being adequately informed of the dangers of smoking it should be resolved in their favor and not in favor of the trustees and their pocketbooks.

CONCLUSION AND PRAYER

For all of the reasons advanced herein it is respectfully



submitted that the court should rule that the application of the fairness doctrine to cigarette advertisements requires that substantially equal time be devoted to messages about the health hazards of cigarette smoking.

Respectfully submitted,

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BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,285

JOHN F. BANZHAF, III,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

WTRF-TV, INC., AND NATIONAL ASSOCIATION
OF BROADCASTERS,
AMERICAN BROADCASTING COMPANIES, INC.,
Intervenors.

Nos. 21,525 & 21,526

WTRF-TV, INC., AND NATIONAL
ASSOCIATION OF BROADCASTERS,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

HEART DISEASE RESEARCH FOUNDATION,
et al.,
Intervenors.

No. 21,577

THE TOBACCO INSTITUTE, INCORPORATED, et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

ON PETITION TO REVIEW ORDERS OF THE
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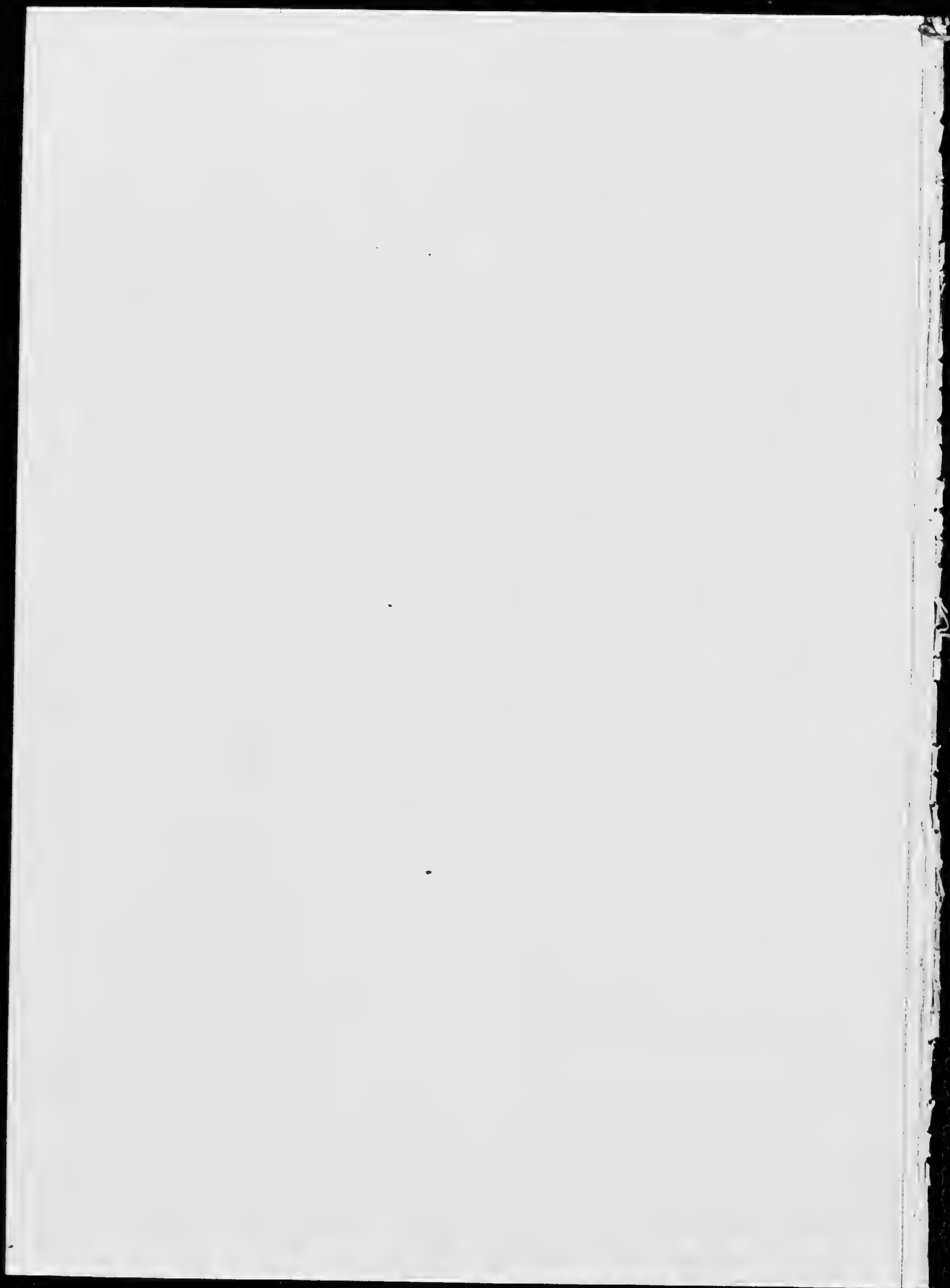
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STATEMENT OF QUESTIONS PRESENTED

The issues in these consolidated cases, as stipulated and agreed to by the respective parties, are as follows:

In Case No. 21,285:

1. Whether the Federal Communications Commission erred as a matter of fact and/or law in ruling that although the fairness doctrine applies to cigarette advertising it does not require that the broadcast time made available under the ruling be substantially equal to that devoted to cigarette advertising.

In Case Nos. 21,525,526:

1. Whether this ruling is precluded by reason of the Federal Cigarette Labeling and Advertising Act and the Congressional purposes and findings that underlie this statute.

2. Whether the Commission's ruling contravenes the First, Fifth or Ninth Amendments to the Constitution.

3. Whether this ruling is in excess of the Commission's statutory authority, constitutes an abuse of discretion, is arbitrary or capricious or is otherwise unlawful.

4. Whether, in adopting this ruling, the Commission observed the procedures required by law.

5. Whether, if the ruling is otherwise valid, the Commission erred in ruling further that licensees who broadcast cigarette commercials and who grant a significant amount of time to spokesmen for the view that smoking may be hazardous are not obligated to grant reply time to cigarette manufacturers.

In Case No. 21,527:

1. Whether the application of the FCC's "Fairness Doctrine" to cigarette product advertisements on radio and television is consistent with the Federal Cigarette Labeling and Advertising Act.
2. Whether the "Fairness Doctrine" may be validly applied to routine commercial product advertisements.
3. Whether the Federal Communications Commission validly applied the "Fairness Doctrine" in the present case to cigarette product advertisements, without examining a single such advertisement, on the assumption that all cigarette advertisements per se constitute the presentation of one side of the smoking-and-health controversy.
4. Whether the Federal Communications Commission improperly denied cigarette industry spokesmen the right of reply under the "Fairness Doctrine" to broadcasts presenting the view that cigarette smoking is a health hazard.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,285

JOHN F. BANZHAF, III,
Petitioner,
v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

WTRF-TV, INC., AND NATIONAL ASSOCIATION
OF BROADCASTERS,
AMERICAN BROADCASTING COMPANIES, INC.,
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Nos. 21,525 & 21,526

WTRF-TV, INC., AND NATIONAL
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v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

HEART DISEASE RESEARCH FOUNDATION,
et al.,
Intervenors.

No. 21,577

THE TOBACCO INSTITUTE, INCORPORATED, et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

ON PETITION TO REVIEW ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

JURISDICTIONAL STATEMENT

These consolidated ^{1/} cases seek review of a letter of
June 2, 1967 (R. 15-17), written by the Federal Communications

1/ Nos. 21,525 and 21,526 were originally filed in the United
States Court of Appeals for the Fourth Circuit. By Order dated
December 18, 1967, they were transferred to this Court. On
February 1, 1968, this Court ordered a consolidation of all the
cases.

Commission to WCBS-TV, New York City, and of a Memorandum Opinion and Order, released September 13, 1967 (R. 814-74) denying reconsideration thereof. Review is also sought of two further letters: one of September 21, 1967 (R. 882-4) clarifying certain language in the Memorandum Opinion and Order, and another of December 21, 1967 (R. 896-97) directed to the Tobacco Institute, and denying reconsideration of the ruling contained in the letter of September 21, 1967. The petitions for review were filed under section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. section 402(a). Jurisdiction of this Court rests on section 2 of the Judicial Review Act, 28 U.S.C. 2342. Venue in this judicial circuit is based on 28 U.S.C. section 2343.

COUNTERSTATEMENT OF THE CASE

As a number of the opening briefs contain statements of the case which are replete with argumentation, it is felt the Court would be assisted by a counterstatement.

1. Introduction

These appeals stem from a Commission ruling of June 2, 1967 (together with subsequent actions taken on September 13, 1967 and December 21, 1967), that broadcasters who carry cigarette commercials are obliged to devote a reasonable amount of time to informing their listeners of the hazards to health which smoking may entail.

The petitioner in Case No. 21,285 is John F. Banzhaf, III, a citizen whose complaint to the Commission regarding the alleged

failure of Station WCBS-TV, New York, to present contrasting views on the question of cigarette smoking led to the Commission's ruling. Banzhaf contends that the Commission's orders on review do not go far enough and that the Commission should require broadcasters to afford "equal time," that is, to balance the amount of time devoted to cigarette commercials with an equivalent amount, in which the anti-smoking viewpoint is presented.

The petitioners in case Nos. 21,525 and 21,526 are the National Association of Broadcasters, a trade association, and Station WTRF-TV, Inc., a television station subject to the Commission's ruling. Another trade association, The Tobacco Institute, together with eight companies engaged in the manufacture of cigarettes, have also sought review (Case No. 21,577). These parties attack the Commission's order on a variety of grounds, but in essence their position is that broadcasters are free to carry commercials which seek to induce their audience to smoke cigarettes without incurring any legal obligation to advise listeners and viewers of potential hazards to health. Also filing briefs in support of this position are the Columbia Broadcasting System, and (in a joint brief) the National Broadcasting Co., Inc., the American Broadcasting Companies, Inc., and WLLE, Inc., all of whom have intervened as parties to the appeals.

2. The Proceedings Before The Commission

On January 5, 1967, Mr. John F. Banzhaf, III, filed a complaint (R. 1-2), with the Commission against WCBS-TV, a television station in New York City owned and operated by Columbia Broadcasting

System. Inc. Mr. Banzhaf stated that WCBS-TV had carried numerous cigarette advertisements presenting the point of view that cigarette smoking is "socially acceptable, desirable, manly, and a necessary part of a rich full life," and specified three particular ads falling within that description. His letter indicated that he had twice written to CBS, demanding responsive time under the Commission's Fairness Doctrine, and had been denied an opportunity to present an opposing view with respect to the desirability of smoking cigarettes. He claimed that WCBS-TV had not been complying with the Fairness Doctrine and requested that the Commission investigate and take appropriate steps to insure that henceforth the station would afford a "corresponding" amount of free time for the presentation of anti-smoking material. Banzhaf's correspondence with CBS as well as the station's reply were attached (R. 3-8).

On June 2, 1967, the Commission issued a ruling on the complaint filed by Banzhaf holding generally that the Fairness Doctrine is applicable to cigarette advertising:

We stress that our holding is limited to this product -- cigarettes. Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and Congressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance -- that however enjoyable, such smoking may be a hazard to the smoker's health. (R. 16).

The Commission declined, however, to require broadcasters to provide approximately equal time for the anti-smoking point of view. The fairness requirement was instead phrased in terms of some responsive programming each week. The Commission noted that ultimately, the broadcaster must make the judgment as to how much time to devote to the responsive materials, and in what format, and observed that WCBS-TV appeared to be aware of its responsibilities in this area. The concluding paragraph stated:

The guidelines in the foregoing discussion are brought to your attention so that in connection with the above continuing program you may make the judgment whether sufficient time is being allocated each week in this area. (R. 17).

Thereafter, numerous petitions for reconsideration were filed by many of the affected parties, including the major networks (R. 246-257, 403-420, 421-426), the National Association of Broadcasters (R. 443-458), numerous broadcast organizations (e.g., R. 459-484), the Tobacco Institute (R. 352-367), and an advertising trade association (R. 397-399). Following consideration of this and much other material ^{2/} the Commission on September 13, 1967, issued a Memorandum Opinion and Order denying reconsideration of its earlier ruling (R. 814-874). The Commission discussed at great length each of the issues raised by the parties and concluded that none had sufficient merit to undercut the basic decisional rationale expressed in the earlier letter ruling.

Finally, in response to a request for clarification, the Commission made clear that where a broadcast station carries cigarette

^{2/} The record filed in this Court comprises more than 300 entries and is almost 900 pages in length.

commercials and affords reasonable time for the presentation of anti-smoking views, it incurs no obligation to afford rebuttal time to cigarette spokesmen (R. 882-884). On December 21, 1967, the Tobacco Institute's request for reconsideration of this ruling (R. 889-894) was denied by the Commission (R. 896-897).

3. The Basis For The Commission's Decision

The Commission's opinions in this case, particularly its order denying reconsideration, (R. 814-874) contain a lengthy and carefully reasoned discussion of the many legal and policy considerations bearing on its action. The claim that it violated the First and Fifth Amendments was rejected, largely on the authority of this Court's decision in Red Lion Broadcasting Co. v. F.C.C., __ U.S. App. D.C. __, 381 F.2d 908 (1967) cert. granted, __ U.S. __ (R. 818). The Commission also discussed at length the contention that its cigarette ruling was precluded by the Cigarette Labeling Act of 1965.^{3/} After a careful and lengthy review of the substance of that Act, as well as the legislative history, the Commission concluded that Section 5 of the Labeling Act was meant only to preclude any requirement of a health warning in the advertising itself, but that there was no legislative intent otherwise to foreclose the use of radio, along with other educational media, as an effective

^{3/} 79 Stat. 282 (1965), 15 U.S.C. 1331-1339. That Act requires that cigarette packages be labeled with the statement: "Caution: Cigarette Smoking may be Hazardous to Your Health." The Act also, inter alia, prohibits the requirement of any other cautionary statement on cigarette packages, and prohibits for three years any requirement that cigarette advertising include a statement relating to smoking and Health.

means of informing the public of the potential hazard of smoking. It was the Commission's view that in fact its ruling was not only consistent with but indeed furthered the Congressional intent, expressed in the Labeling Act, to promote extensive educational campaigns with respect to the effects of smoking on health (R. 829-837).

Similarly the Commission gave careful consideration to arguments that the Fairness Doctrine should not be applied to commercial matter (R. 820-823), that it could not logically be limited to cigarette advertising (R. 846-847), and that the ruling would undermine the commercial structure of broadcasting (R. 848-850). It concluded that these and similar contentions were simply unpersuasive in the face of the potential hazards of smoking and the role played by the broadcast media, through the airing of cigarette commercials, in the promotion of the use of cigarettes.

"There is," the Commission concluded, "some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of 'horrible' extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty 'to operate in the public interest' (§315(a)), is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in

the public interest. In view of the legislative history of the Cigarette Labeling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it (except, of course, for whatever voluntary judgment the broadcasting industry might now make). But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter -- that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility." (R. 855-856).

STATUTES INVOLVED

The petitioners have included in their appendices all relevant statutory material.

SUMMARY OF ARGUMENT

I.

The requirement that licensees who carry cigarette advertising devote a significant amount of time, on a weekly basis, to the presentation of the anti-smoking point of view is a reasonable application of the Commission's Fairness Doctrine. The American public is exposed every day to a large volume of advertising which seeks to create the impression that cigarette smoking is enjoyable and not incompatible with good health. Cigarette advertising therefore presents one side of a controversial issue of public importance, i.e., that of smoking and health, and accordingly, licensees are obligated, under the general public interest standards of the Communications Act of 1934, as amended, and specifically under the provisions of section 315 thereof, to present the other (anti-smoking) side of the issue. It is not necessary for the advertisements to be couched in rational or intellectual terms to trigger the fairness obligation. What is significant is the overall impression which the viewer is likely to take away from the ad.

Application of the Fairness Doctrine to cigarette advertising is in complete accord with the fundamental purpose of the Doctrine, which is to require basic fairness in the espousal of conflicting views or positions on controversial issues of public importance in order to assure the public's awareness of the competing or opposing considerations. This basic obligation

of the broadcaster is particularly vital where life or health is in issue and the Commission has consistently treated such questions with particular care. The present ruling is thus in accord with prior practice in this area. The Commission's conclusion that application of the Fairness Doctrine to cigarette advertising is consistent with past practice and furthers the purpose of the Doctrine, as an agency interpretation of its own rule, is entitled to great weight. In any event, the Commission is free to modify its view, provided it supplies adequate reasons for so doing and can justify the new interpretation. The critical question is not whether the Fairness Doctrine has ever been applied in the past to a situation exactly like that presented here, but rather whether the present application is itself reasonable.

Under the Commission's ruling the licensee is allowed considerable latitude in the selection of the form and quantity of anti-smoking material. There is thus no undue impairment of the licensee's recognized discretion in the selection of program material. Nor is there any unfairness in denying to the pro-smoking viewpoint an automatic right of rebuttal of the anti-smoking material. The restriction of the present ruling to cigarette ads among all commercial advertising is a sound and entirely workable distinction. Cigarette smoking has become the subject of unique concern in both private and government agencies, and has been singled out as being, in ordinary use, a substantial health hazard to millions of Americans. In any event, the only substantial question on review

here is whether the application of the Doctrine to cigarette ads is reasonable.

There was no procedural inadequacy in the actions below. All interested parties had ample opportunity to comment on the ruling, and dozens of individual filings were submitted. Every argument and every point of view was presented, and adequately dealt with by the Commission. The ruling was prospective only, and the one licensee most directly involved was specifically found to be in compliance with the Commission's requirements.

II

The Cigarette Labeling and Advertising Act of 1965 in no way affected the obligation of broadcasters under 47 U.S.C. 315(a) to operate in the public interest and present conflicting viewpoints on controversial issues of public importance. Neither the statute nor its legislative history refer to the Communications Act or the regulatory authority of the Commission, and it is well settled that one statute will not be construed as impliedly repealing a prior one unless no other construction is possible. This is not the case here.

Petitioners' contention that Congress intended to "preempt" the field, thus barring the Commission from acting as it did, is not well-founded. The language of the statute shows that Congress intended only to foreclose action directed

toward the terms of cigarette advertising itself. Thus Federal agencies would be prevented from requiring that "in the advertising" a representation be made that smoking may be harmful to health. The legislative history is consistent with this purpose. The hearings and debates focused on a proposal by the Federal Trade Commission requiring that the advertising itself contain matter alerting the public to the hazards of smoking. Responding to claims that this requirement would create undue hardship for the tobacco industry and the advertising media, Congress provided in Section 5 of the Act that "no statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with" certain provisions set forth elsewhere in the Act. The "preemption" of Section 5 is thus clearly directed to measures designed to regulate the form or content of cigarette advertising as it bears on the health question.

The Commission action under review does not purport to regulate cigarette commercials. It does not affect the content of the advertising or the amount which stations may carry. It simply recognizes that commercials constitute a presentation of one side of the cigarette question, that smoking is a satisfying and enjoyable experience. Measuring this against the standard of Section 315(a) and the Fairness Doctrine the Commission concluded that broadcasters must, somewhere in the

course of their programming, and essentially by means of their own choosing, advise their audience that however enjoyable, cigarette smoking may be harmful to health.

Moreover, one of the considerations in the adoption of the Labeling Act was that "extensive smoking educational campaigns" by private and public agencies were being conducted. This was one reason why Congress decided that no warning in the advertising itself was deemed necessary at this time. Further, Congress appropriated \$2 million to finance educational efforts in this area by the Department of Health, Education and Welfare. The Commission's ruling that the public interest requires broadcasters to devote some time to the health hazard question clearly implements these efforts, thus furthering national policy in this area.

III

Finally, it is clear that the Commission's action does not abridge the First Amendment right of free speech. The power of Congress to regulate interstate commerce includes the power to regulate the use of the airwaves. This authority has been validly delegated to the Commission. A vital aspect of radio regulation is to assure that the airwaves do not become monopolized by one point of view and to provide that a fair hearing is given to competing positions on important public issues. Indeed, one reason that such a large number of frequencies is allocated to broadcasting is so that the public can become better

informed. The Commission's action here, and the Fairness Doctrine under which that action was taken, further this objective.

The Commission's ruling in no way restricts petitioners' right to say whatever they wish about smoking. It simply requires that when broadcasters permit the extensive use of their facilities to promote the use of cigarettes, they must take steps to advise their audience of the hazards involved. Since the ruling is reasonably related to the public interest standard of the Communications Act, no right of free speech has been violated. National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Red Lion Broadcasting Co. v. F.C.C., ___ U.S. App. D.C. ___, 381 F.2d 908 (1967), cert. granted ___ U.S. __.

ARGUMENT

I. THE COMMISSION PROPERLY APPLIED THE FAIRNESS DOCTRINE TO CIGARETTE ADVERTISING. ITS RULING IS REASONABLE, WELL WITHIN THE COMMISSION'S DISCRETION, AND IS SUPPORTED BY THE RECORD BELOW.

The three major networks, the National Association of Broadcasters, and the Tobacco Institute argue that application of the Fairness Doctrine to cigarette advertising is improper. While the arguments vary somewhat in conception and approach, each party argues in essence that cigarette advertising is not the kind of broadcast material which should come within the ambit of the Fairness Doctrine.

We believe that all parties would agree, however, that a public controversy of major dimensions presently surrounds the subject of cigarette smoking. In this connection the Commission discussed at some length the government and private reports on smoking and the serious health hazards which may be involved (R. 835-36, 853-55). Nor do the parties contest that the current level of cigarette advertising exposes the American public, including the young, to a very high level of messages which encourage smoking of cigarettes. The record below shows that WCBS-TV, the station originally complained of by Mr. Banzhaf, presents between five and ten minutes a day of cigarette advertising (R. 843).

Radio and television revenues in 1966 for cigarette advertising amounted to \$299,300,000. Fairness, Freedom, and Cigarette Advertising: A Defense of the Federal Communications

Commission, 67 Col. L. Rev. 1470, 1479 n. 84 (1967).^{4/} That advertising is a pervasive and profound influence on social thinking and activities is unarguable. See, e.g., F. P. Bishop, The Ethics of Advertising (London: 1949), pp. 139-140. And television is today considered the most persuasive selling medium in the world. Note, The Regulation of Advertising, 56 Col. L. Rev., 1018, 1089 (1956). See also Note, Television Advertising, 72 Yale L. J. 145, 156 n. 46 (1962).^{5/} It is clear, therefore, that cigarette advertising on radio and television poses a problem of substantial social dimensions.^{6/}

Under the Communications Act broadcasters are required "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance", 47 U.S.C. 315(a). As the Senate Report accompanying this measure explained: "[B]roadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has

^{4/} The June, 1967, ETC. report to Congress states that in 1966 cigarette advertising accounted for 7.2% of total television advertising expenditures (R. 848).

^{5/} At least one commentator argues that "advertising has always been regarded as the backbone of the [tobacco] industry. It was the chief factor in the phenomenal rise in cigarette popularity in the early part of the century. . . ." Wegman, Cigarettes and Health, 51 Cornell L. Q. 678, 728 (1966). A recent discussion of advertising and society appears in the Saturday Review for April 13, 1968, pp. 81-88.

^{6/} Cigarette advertising and smoking have raised difficulties in other countries as well. Since 1966 cigarette advertising has been prohibited on radio and television in England. Advertising Age, Oct. 10, 1966, p. 18. The Soviet Union, Denmark, England, and other countries have conducted public campaigns to warn the smoker of potential hazards. Wegman, Cigarettes and Health, 51 Cornell L. Q. 678, 754 (1966).

assumed the obligation of presenting important public questions fairly and without bias." S. Rept. No. 562, 86th Cong., 1st Sess., p. 9 (1959).^{7/} It is the Commission's position (R. 855-856) that if this standard means anything at all it means at least this: that where a broadcaster allows his facilities to be used to encourage consumption of a product which -- according to studies of private and public agencies -- can in normal use be harmful to health, an obligation arises to inform the public on this aspect of the matter.

We think this proposition is so clear as to be virtually axiomatic. Petitioners have, however, attacked it on a variety of grounds: that cigarette advertising does not constitute the presentation of a viewpoint with respect to the health question; that the Fairness Doctrine does not encompass advertising; that assuming the fairness standard applies, rebuttal time should be afforded tobacco industry spokesmen; that the ruling cannot logically be confined to cigarettes; and that the decision in the case was reached in violation of the procedural rights of affected parties. The Commission's opinion on reconsideration addressed itself fully to these contentions, and the following discussion,

^{7/} This in essence is the "Fairness Doctrine." It received its fullest expression in the Report on Editorializing, 13 F.C.C. 1246, issued by the Commission in 1949 and was expressly approved by Congress in the amendment to Section 315 referred to in the text. See also Red Lion Broadcasting Co. v. F.C.C., __ U.S. App. D.C. __, 381 F.2d 908 (1967), cert. granted __ U.S. __.

which deals with them seriatim, sets forth the considerations on which the Commission relied. It shows, we submit, that the action on review is a most reasonable and responsible implementation of the public interest standard of the Communications Act.

A. Cigarette Advertising Raises A Controversial Issue Of Public Importance.

The various parties contend that application of the Fairness Doctrine to cigarette advertising is improper because the ads do not constitute "discussion"^{8/} of one side of an issue and present no viewpoint.^{9/} The parties' arguments may be summarized as follows: Cigarette advertising attempts to promote only the particular brand mentioned in the ad, rather than smoking in general; and this promotion is not couched in rational, analytic or intellectual terms, but is rather "whimsical," attention catching, or designed to appeal to nonrational interests. Many cigarette ads are thus based on repetition of essentially meaningless phrases, e.g., "come to Marlboro country."^{10/} It is asserted that the ads not only

^{8/} Tobacco Institute Br. pp. 39-40; NAB/WTRF, Inc. Br. pp. 50-52, 58-59; CBS Br. pp. 31-35.

^{9/} Tobacco Institute Br. pp. 55-59; NAB/WTRF, Inc. Br. pp. 58-59; ABC/NBC/WLLE Br. pp. 25-26.

^{10/} While we do not contest that this is true of most cigarette ads, we note that some do attempt to reach the rational faculties. Some ads, for example, stress the existence of a filter (e.g. True Cigarette ads). Others emphasize the greater length of the brand being promoted.

do not make any explicit statements on the health question, but are in fact prohibited by law from doing so.^{11/} Accordingly, argue the parties, since the ads do not raise one side of a controversial issue of public importance, i.e., whether cigarette smoking is hazardous to health, there is no occasion to air the opposing point of view under the Fairness Doctrine.

In its Memorandum Opinion and Order denying reconsideration, the Commission dealt at length with this contention. In part, it said:

[W]e are unable to accept the argument that in the absence of any express health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose. The June 30, 1967 FTC Report amply documents its conclusion that cigarette commercials today still contain the two principal elements it found to exist in 1964--a portrayal of the desirability of smoking and assurances of the relative safety of smoking (pp. 15-16). The F.T.C. states that the desirability is portrayed in terms of the satisfactions engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences, and that by so doing the impression is conveyed that smoking carries relatively little risk. (ibid.)^{14/}

^{14/} The FTC Report states (p. 17) that an estimated 58 percent of the public feel that current cigarette advertising leaves the impression that smoking is a healthy thing to do.

^{11/} Trade Reg. Rep. Par. 7894; CBS Br. p. 34. The parties stress that unfair, deceptive, or misleading advertising is squarely prohibited by the present F.T.C. regulations. This is irrelevant, however. The point is that even advertising which complies with the F.T.C. requirements does not necessarily comply with this Commission's Fairness Doctrine. In fact, it has been suggested that the F.T.C. "would be clearly warranted in finding that today's cigarette advertising is no less deceptive (and far more insidious) than the advertisements which prompted the case and desist orders of the past two decades." Wegman, supra, at 733.

The report supports this conclusion, more than adequately in our view, by a comprehensive review and analysis of the advertising submitted by a large number of cigarette companies. . . . (R. 838-839).

After noting the FTC's careful documentation of the many appeals in cigarette advertising to the "satisfaction" theme, and the attempt in the ads to escape from reality to the worry-free shangri-las such as "Salem country," the Commission went on to note:

It comes down, we think to a simply controversial issue: the cigarette commercials are conveying any number of reasons why it appears desirable to smoke but understandably do not set forth the reasons why it is not desirable to commence or continue smoking. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose. * * * The claim that no controversial issue of public importance is presented by cigarette advertising is neither realistic nor persuasive. (R. 841-842).

It is useful to remember that a chief purpose in cigarette advertising is to promote smoking, and as the Commission noted, none of the protesting parties has been able to point to a single ad which does not encourage the listener or viewer to smoke.^{12/} While the techniques of persuasion employed may not be those of analytic or rational inquiry, the ultimate goal is not thereby put in question. In our view, the presentation of a television advertisement showing, for example, a handsome and healthy couple obviously enjoying cigarette smoking in a sylvan setting, suggestive of rural ruggedness and robust, invigorating activity, intends to, and does in fact, convey a message about smoking as surely as would specific discussion. The message is that cigarette smoking is desirable and at the very least,

^{12/} A recent law review article supports the conclusion that cigarette advertising is one sided: Cigarette Advertising, 67 Col. L. Rev. 1470, 1480 (1967).

not incompatible with good health. That this point of view is given to the television audience by implication, and through the manipulation of visual imagery, (and, of course, to the radio audience in a different way), rather than more directly in an explicit statement, cannot realistically alter the conclusion that advertising is taking a position on the health controversy. What is significant is the overall impression which the average viewer is likely to take away from the advertisement. See Charles of the Ritz Distributing Corp. v. Federal Trade Commission, 143 F.2d 676, 679 (2d Cir., 1944); P. Lorillard Co. v. Federal Trade Commission, 186 F.2d 52, 58 (4th Cir., 1950) establishing this principle in the area of deceptive advertising.

It is common knowledge that advertising is becoming less information oriented, and more subtle in its persuasive techniques.^{13/} For this reason it is all the more important for the Commission to look beyond the form of the presentation and examine its substance and its effect. In applying this approach to advertising the Commission was doing no more than it has traditionally done with regard to other broadcast matter. Thus

^{13/} Developments in the Law: Deceptive Advertising, 80 Harv. L. Rev., 1005, 1010 (1967). Cases dealing with misrepresentation through silence are collected and discussed at pp. 1047-1051. See also W. Taplin, Advertising, A New Approach (Boston: 1960), in which the author, a thoughtful student of advertising, refers to the difficulty of distinguishing between information and persuasion and concludes that advertisers inevitably go beyond the mere providing of information. (pp. 35-40).

in a public notice issued five years ago the Commission cautioned broadcasters that the format or label given a particular program was not material in determining the applicability of the Fairness Doctrine:

In determining compliance with the fairness doctrine the Commission looks to substance rather than to label or form. It is immaterial whether a particular program or viewpoint is presented under the label of "Americanism", "anti-communism" or "states' rights", or whether it is a paid announcement, official speech, editorial or religious broadcast. Regardless of label or form, if one viewpoint of a controversial issue of public importance is presented, the licensee is obligated to make a reasonable effort to present the other opposing viewpoint or viewpoints.

Controversial Issue Programming--Fairness Doctrine,
25 Pike and Fischer, RR. 1899, 1900 (1963).

B. The Commission's Ruling Is In Accord With Both
The History And Purposes Of The Fairness Doctrine.

A number of the parties argue that the cigarette ruling is inconsistent with the history of the Fairness Doctrine and conflicts with its purposes.^{14/} It is thus argued that the Doctrine was never intended to apply to commercial advertising or to non-discussion type presentations, and has never been squarely so applied prior to the present case. These arguments are not persuasive, as we will show below.

It has long been settled that advertising falls within the public interest responsibilities of a licensee, Head v. Board

^{14/} Tobacco Institute Br., pp. 36-40; NAB/WTRF Br., pp. 56-60; CBS Br., pp. 37-42.

of Examiners, 374 U.S. 424, 437-441 (Brennan J., concurring),^{15/} and the Commission has been particularly concerned with advertising and programming having a bearing on the public health or safety. On reconsideration, the Commission discussed at length the history of its regulation in this area, demonstrating conclusively that beginning with the Federal Radio Commission, broadcast advertising has been subject to Commission jurisdiction, and that health and safety questions, when raised in the context of commercial practices have been scrutinized with particular care. (R. 820-823). See KFKB Broadcasting Association v. F.R.C., 60 App. D.C. 79, 80, 47 F.2d 670, 671 (1931); Farmers and Bankers Life Insurance Co., 2 F.C.C. 455, 457-459 (1936); WSBC, Inc., 2 F.C.C. 293, 294-296 (1936); Sam Morris, 11 F.C.C. 197 (1946); Broadcast of "Living Should Be Fun," 33 F.C.C. 101, 107 (1962). It is, of course, well settled that an agency's interpretation of its own rules is controlling unless plainly erroneous. Udall v. Tallman, 380 U.S. 1, 16 (1965); Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414 (1945). The principle applies equally to an interpretation of agency policy.

^{15/} In 1957 the Commission observed that it "has consistently held that the selection and presentation of program material, including advertising, is the responsibility of the broadcast station licensee, subject to its statutory obligation to operate in the public interest. In fulfilling this obligation, a broadcast station is expected to exercise reasonable care and prudence with respect to advertising copy in order to assure that no material is broadcast which will deceive or mislead the public. Liaison Between F.C.C. and F.T.C. Relating to False and Misleading Radio and TV Advertising, 14 Pike and Fischer, R.R. 1262 (1956).

Furthermore, as the Commission noted, even if the present ruling represented a wholly unprecedented extension of the Doctrine, that fact, standing alone, would not be enough to invalidate it, as the petitioners and intervenors appear to argue. That the Commission may change its view of the public interest responsibilities of its licensees is unquestionable. As the Supreme Court has recently noted in an analogous context:

We agree that the [ICC], faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practices. . . . In fact . . . this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday. American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co., 387 U.S. 397, 416 (1967).

See also F.C.C. v. WOKO, 329 U.S. 223 (1946); F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134 (1940). And this Court has recently reaffirmed the principal in New Castle County Airport Commission v. Civil Aeronautics Board, 125 U.S. App. D.C. 268, 371 F.2d 733 (1966), cert. denied, 387 U.S. 930, wherein Judge Leventhal noted, in a phrase particularly apt in the present context, that an administrative agency concerned with furtherance of the public interest is not bound to rigid adherence to precedent, but it may "switch rather than fight" the lessons of experience. 125 U.S. App. D.C. at 270, 371 F.2d at 735.

The Commission itself noted that the relevant question is not whether precedent supports the present ruling, but rather whether the present view is sustainable:

While the agency's position as to what the obligation to operate in the public interest requires for cigarette advertising may have fluctuated over the years since 1929, the exercise of such authority in the present circumstances is plainly reasonable. Considering the 1964 Report of the Surgeon General's Advisory Committee, the establishment of the National Interagency Council on Smoking and Health and the enactment of Cigarette Labeling and Advertising Act (Public Law 89-92, 15 U.S.C. 1331 et seq.) in 1965, and the recent Reports to Congress by the Federal Trade Commission and the Department of Health, Education and Welfare pursuant to that Act, it is not an abuse of discretion for the Commission to decide now that a licensee who presents programming and advertising which encourages the public to form this habit potentially hazardous to health has, at the very least, an obligation adequately to inform the public as to the possible hazard. (R. 823)

The parties stress, however, that traditionally the Fairness Doctrine has been administered in such a fashion as to maximize the free exercise of honest licensee judgment as to the amount and manner of responsive presentations, and that the present ruling, by its insistence on anti-smoking presentations on a weekly basis, substitutes Commission fiat for licensee judgment.

The Commission dealt with this contention below, and adequately explained why it had determined that this special regimen was required:

Like CBS, we recognize that the presentation of one side of a controversial issue of public importance in advertising programming poses a situation which differs from that usually pertaining to the presentation

of controversial issues in news and public affairs programming. * * * But as CBS points out, commercials are by nature "repetitive and continuous:" the complaint here went to advertisements broadcast daily for a total of 5-10 minutes each broadcast day. We think that the frequency of the presentation of one side of the controversy is a factor to be considered appropriately in our administration of the Fairness Doctrine under the act's basic policy of the "standard of fairness" For, while the Fairness Doctrine does not contemplate "equal time," if the presentation of one side of the issue is on a regular continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issue. (R. 843)

Additionally the Commission pointed out that because "the repeated and continuous broadcasts of the advertisements may be a contributing factor to the adoption of a habit which may lead to untimely death. . . the licensee is under a higher duty than in the case of other controversial issues to ameliorate the possible harmful effect of the broadcasts by sufficiently informing the public as to the hazard." (R. 844)

This is manifestly a sensible requirement in view of the nature of the problem presented. Nor is it in any sense unprecedented as petitioners suggest. Where frequently repeated spot announcements have been used in political campaigns the Commission has required that in presenting the other side of the question the station, in meeting its obligation under the Fairness Doctrine, must take into account the factor of effective repetition. King Broadcasting Co., 11 Pike & Fischer R.R. 2d 628 (1967).

In sum, notwithstanding the latitude which licensees are afforded in selecting program formats there are instances in which

basic fairness may require that one form be preferred over another. And where, as here, one viewpoint is expressed repeatedly throughout the broadcast day, it is not unreasonable to require some degree of regularity in presenting the opposing view. The Commission stated, however, that this did not mean that the presentation of anti-smoking "spot" advertisements was the only way in which a licensee could fulfill its responsibility: "We stressed in the ruling, and here strongly emphasize again that 'in this, as in the other areas under the fairness doctrine, the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the particular facts of his situation.'" (R. 844-845)

The Commission's determination to adhere to this standard is underscored by its disposition of the Banzhaf complaint. Banzhaf argued to the Commission as he does here that approximately equal time should be required for the presentation of anti-smoking material. Banzhaf suggests that the primary audience to be reached by the anti-smoking materials is youthful, immature, and inordinately dependent on broadcasting for information and opinion on matters of public importance. While it is true the Commission expressed particular concern about the exposure of young people to one-sided presentations urging them to smoke, it declined to require "equal time" primarily because to do so would be to unduly restrict licensees in the exercise of their sound judgment as to the treatment of a fairness doctrine problem.

There is, and always has been, a significant distinction between a licensee's obligations under the "equal opportunities" provision of section 315 of the Act, which applies only to political candidates, and under the broader Fairness Doctrine. In its 1964 Primer on the Fairness Doctrine the Commission noted that: "There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the 'equal opportunities' requirement." 29 F.R. 10415, 10416 (1964).^{15a/} Thus, the Commission's holding that while licensees had an obligation under the fairness doctrine to present substantial or significant anti-smoking material on a weekly basis, they were nevertheless not obligated to provide equal time, represents adherence to historical practice, and is a sound policy judgment which Banzhaf has not shown to be arbitrary or capricious.

C. Fairness Does Not Require That Tobacco Industry Spokesmen Be Afforded Rebuttal Time Where A Broadcast Station Has Presented Both Sides Of The Smoking Controversy.

In its opinion denying reconsideration, the Commission observed that "The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesman for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials." (R. 842) By subsequent order this language was withdrawn on the ground that it "inaptly" set forth Commission policy. Instead the Commission ruled that "a licensee who has carried cigarette commercials has

^{15a/} See also Report on Editorializing, 13 F.C.C. 1246, 1251-2 (1949).

extensively covered one side of the issue so that when he presents a significant amount of time devoted to the other side . . . he is under no obligation to present further materials on the first (pro-smoking) side." (R. 883)

The Tobacco Institute argues that this ruling is unfair.^{16/} Its first point is that since cigarette advertising does not present claims that smoking is not hazardous to health, it does not, in effect, meet the licensee's responsibility to present the pro-smoking side of the controversy. The answer to this is obvious: If the Commission is correct that cigarette advertising does present a pro-smoking point of view, then its clarification denying the advertisers a second opportunity to present their viewpoint is also correct.

Secondly, the Tobacco Institute argues that even if the advertisements implicitly take a position on the health issue, they do not present the kind of reasoned and analytical discussion which is a requisite for an intelligent and informed understanding of the pro-smoking point of view. We have already dealt with this contention in argument I-A, supra. In essence, the Commission has simply found that cigarette advertising by promoting the use of a product which may be habit forming, and which has serious health implications, without more, has raised one side

^{16/} Tobacco Institute Br., pp. 59-63; WTRF/NAB Br., p. 57.

of a controversial issue. Accordingly, that the message is usually implicit or designed to appeal to non-rational interests in no way affects the basic proposition that once smoking has been promoted, anti-smoking material should be presented. To require a more elaborate, reasoned response by the tobacco promoters to the reply of the anti-smoking forces is to compound the pre-existing dominance of one point of view and is neither feasible nor required by any notion of basic fairness.^{17/}

Furthermore, as pointed out by the Commission (R. 882), tobacco organizations are and always have been free to approach broadcasters to purchase regular program time or to suggest sustaining (unsponsored) programs dealing with smoking in which the industry view is presented. Whether to carry such programs is a matter for the judgment of the licensee. The Commission, itself, has made no effort to remove either cigarette advertising or pro-smoking spokesmen from radio and television. All it has required is that the presentation of the pro-smoking viewpoint be balanced by some material which on a weekly basis alerts the public to the dangers which may inhere in the smoking of cigarettes.

^{17/} We note that anti-smoking material, presented by the licensee in response to cigarette advertising, may also comment on the health issue either implicitly or by subtle presentation of material. A much used American Cancer Society "spot" announcement simply shows children amusing themselves by wearing their parents clothing. The announcer states that children learn by imitating their elders, and asks the adult viewer if he smokes. Presentation of such messages would surely comply with the Commission's Fairness requirements, notwithstanding the failure of the material to allude in any explicit way to the health aspect of smoking.

D. The Restriction Of The Present Ruling To Cigarette Advertising Is Entirely Reasonable.

The parties also argue that restriction of the applicability of the Fairness Doctrine to cigarette advertising among all commercial messages is arbitrary, unfair, and unworkable.^{18/} In essence, the arguments come down to the contention that many commercial products raise issues of public importance, and that it is therefore arbitrary to restrict the sweep of the present rule to cigarettes.^{19/}

The Commission answered this argument below by noting that its action as to cigarettes was taken in light of "(1) governmental and private reports and Congressional action with respect to cigarettes, and (2) their assertion in common that 'normal use of this product can be a hazard to the health of millions of persons.'" (R. 846) The Commission indicated that it was not persuaded that other products raised comparable problems, pointing out, for example, that public and private concern over automobile safety has not lead to widespread discouragement of the normal use of the automobile, but only to increased emphasis on safety in its use. In sum, the Commission stated:

We adhere to our view that cigarette advertising presents a unique situation. As to whether there are other comparable products whose normal use has been found by congressional and other Government action to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance, bringing into play the Fairness Doctrine, we can only

^{18/} Tobacco Institute Br., pp. 4-45; NAB/WTRF Br., pp. 50-56; CBS Br., pp. 41-42; NBC/ABC/WLLE Br., p. 30.

^{19/} The parties, of course, take this position not to urge applicability of the Fairness Doctrine to other products, but only to illustrate their argument that the applicability of the Fairness Doctrine to cigarette advertising is arbitrary and improper.

state that we do not now know of such an advertised product, and that we do not find such circumstances present in petitioners' contentions about the advertised products upon which they rely. Thus, to say the least, instances of extension of the ruling to other products upon consideration of future complaints would be rare, if indeed they ever occurred. In short, our ruling applies only to cigarette advertising, and imposes no Fairness Doctrine obligation upon petitioners with respect to other product advertising.

(R. 847)

Commissioner Johnson, concurring, also observed that "By drawing the line at cigarette advertising we have framed a distinction fully as sound and durable as those in thousands of other rules laid down by courts every day since the common law system began." (R. 870)

We believe the foregoing adequately disposes of the parties' contentions on this score. We add, however, that the precise issue before this Court concerns the application of the Fairness Doctrine to cigarette advertising, and to no other commercial products. If the present ruling is reasonable as it stands, there is no occasion for the Court to consider potentially unreasonable expansions of the immediate holding now under review. By the same token, assuming, arguendo, that other products may exist to which the Commission's rationale could be applied, the agency's failure to do so hardly renders its present action invalid. The complaint and the record below dealt with cigarettes and the Commission's action could properly be limited to that product.

E. There Is No Procedural Infirmary In The Actions Below.

The Tobacco Institute argues that the present decision was reached in disregard of procedural requirements and basic standards of fairness.^{20/} This argument is wholly without merit, as an examination of the proceedings below will demonstrate.

The Commission's initial ruling (R. 15-17) was made on complaint of Mr. John F. Banzhaf, III, (R. 1-8), who asserted that WCBS-TV, after airing numbers of cigarette advertisements, had refused to grant him or some other spokesman an opportunity to present contrasting views on the benefits and advisability of smoking. Accompanying Mr. Banzhaf's complaint was the letter written to him by CBS, noting that CBS had aired numerous programs providing contrasting viewpoints on the smoking issue, and taking the position that commercial advertising was not subject to the Fairness Doctrine. (R. 6-8) In its letter to CBS of June 2, 1967, the Commission held that cigarette advertising was subject to the Fairness Doctrine. (R. 15-17) The Commission went on to note:

In this case we note the [sic] WCBS-TV is aware of its responsibilities in this area, in light of the programming described [in CBS' letter to Mr. Banzhaf.] While we have rejected Mr. Banzhaf's claim of "rough approximation of time", the question remains whether in the circumstances a sufficient amount of time is being allocated each

^{20/} Br., pp. 49-52.

week to cover the viewpoint of the health hazard posed by smoking. We note you appear to have a continuing program in this respect. The guidelines in the foregoing discussion are brought to your attention so that in connection with the above continuing program you may make the judgment whether sufficient time is being allocated each week in this area. (R. 17) 21/

On June 23, 1967, CBS filed a letter with the Commission commenting on the ruling and seeking reconsideration. (R. 246-257) Other parties made similar requests. All three networks filed pleadings, as well as the National Association of Broadcasters. Numerous broadcast groups and a large number of individual licensees sought reconsideration. The Tobacco Institute and many cigarette advertisers similarly sought reversal of the ruling. In fact, the Certified Index to Record, filed in this Court, shows a total of 336 entries in the record, which runs almost 900 pages. The Commission's decision denying reconsideration occupies almost 40 closely spaced pages in the F.C.C. reports, and includes separate statements of two concurring Commissioners. Every argument, point of view, and consideration presented in the numerous briefs in this Court was before the Commission, and its opinion indicates an awareness and careful consideration of each of them. In these circumstances, to suggest that the Commission has acted summarily or without proper regard for the essentials of fair administration is frivolous.

21/ It is not the Commission's normal procedure to accord the public in general an opportunity to be heard with respect to fairness complaints against licensees even though, as here, the complaint may involve an important issue of policy, e.g. Times Mirror Broadcasting Co.,²⁴ Pike & Fischer, R.R. 404 (1962). As described above, however, before the instant proceeding was terminated the Commission considered the views of all who filed pleadings setting forth their views.

We do not understand what purpose would be served by the taking of further evidence as to the specific contents of cigarette ads. The Commission's ruling was a broad one, based on the finding that cigarette advertising, by promoting smoking as an activity not incompatible with good health, created a Fairness Doctrine obligation ^{22/} on the part of a broadcaster.

Furthermore, on reconsideration the Commission explicitly noted that its ruling would be applied prospectively only. (R. 852) Accordingly, we see no prejudice to any party in the procedures employed below. The plain fact is that the industry and all those affected by the ruling had ample opportunity, of which many availed themselves, to present their position to the Commission, and the only licensee directly involved in the ruling was held to have violated no Commission policy in this area.

* * *

In sum, petitioners have failed to show that the Commission's ruling was unreasonable. The ruling is, as the

^{22/} Nor is there any force to the Institute's argument that the record is inadequate (Br. pp. 52-55). The Commission's finding that cigarette advertising portrays smoking as enjoyable and healthful is adequately documented, and is plainly correct, as any television viewer can himself determine. The text and visual material of three typical ads, two of which are apparently those complained of by Mr. Banzhaf, are reproduced in the record at pp. 416-420. They amply support the Commission's basic findings.

Commission observed, essentially a simple expression of broadcast licensees' obligations under the Communications Act, and specifically the requirements of section 315 thereof. Moreover, aside from particularized and doctrinal requirements, we submit that a licensee of the public airwaves who presents cigarette commercials has a basic public interest obligation to inform his listeners that however enjoyable cigarettes may be, smoking is a habit which may cause or contribute to the earlier death or disability of the user. As the Commission aptly concluded, "the public interest means nothing if it does not include such a responsibility."

II. THE COMMISSION'S RULING IS NOT PRECLUDED BY THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT AND IS ENTIRELY CONSISTENT WITH THE POLICY OF THAT ACT.

We have stressed in the preceding section that broadcasters are obliged "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance," 47 U.S.C. 315(a). See also 47 U.S.C. 307(d), 309(a). As this Court has recognized, "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." Office of Communications of United Church of Christ v. F.C.C., 123 U.S. App. D.C. 328, 337, 359 F.2d 994, 1003 (1966).

The petitioners (except Banzhaf) contend that under the Federal Cigarette Labeling and Advertising Act of 1965, P.L. 89-92, 15 U.S.C. 1331-1339, the foregoing principles have been suspended insofar as they relate to the obligation of broadcasters to apprise their audience of the hazards to health which cigarette smoking may entail. Petitioners argue that through the Labeling Act Congress has "preempted" the field, and the Commission's action is therefore beyond its authority and contrary to national policy. Although petitioners can point to not a single instance in the language of the statute or the legislative history to show that the regulatory authority of the Commission under the Communications Act was considered or

discussed when this legislation was enacted, they maintain that the Commission was impliedly directed to remain out of the cigarette controversy and that its action "disrupts" the accommodation established by Congress.

It is well settled that "Repeals by implication are not favored. A law is not to be construed as impliedly repealing a prior law unless no other construction can be applied." U.S. v. Jackson, 302 U.S. 628, 631 (1938). See also U.S. v. Yuginovich, 256 U.S. 450 (1921). Nor do cases construing the Supremacy Clause of the Constitution, to which petitioners analogize the present case, call for a different result. "Statements concerning the exclusive jurisdiction of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive," California v. Zook, 336 U.S. 725, 731 (1949). See also Head v. New Mexico Board of Examiners, 374 U.S. 424, 430 (1963); Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).^{23/}

Petitioners' arguments were carefully considered by the Commission, but the agency concluded, properly in our view, that Congress would not have sub silentio "overturned so basic

^{23/} In the latter case the Court stated:

"The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." Id.

a tenet of communications law and policy" as the obligation to afford opportunity for the presentation of conflicting viewpoints on controversial public questions. (R. 829) The Commission further found, and in its opinion demonstrated, that in fact its action advanced the purposes of the Labeling Act (R. 830-833). We respectfully refer the Court to this portion of the orders under review (R. 824-837) as constituting a comprehensive and closely reasoned discussion of the question. We think it clear from that discussion and from the following sections of our brief that the Commission's ruling is not contrary to the intent of Congress as reflected in either the language or the legislative history of the Labeling Act and that its action will help to fulfill one of the essential objectives of the statute.

A. The Cigarette Labeling Act By Its Terms Does Not Preclude The Commission From Requiring Broadcasters To Inform The Public Of Potential Health Hazards Where Their Facilities Have Been Utilized To Promote The Use Of Cigarettes.

At the outset it should be understood what the Commission's ruling does and does not require: It does provide (R. 815) "that a station which carries commercials promoting the use of a particular cigarette as attractive and enjoyable is required to provide a significant amount of time to the other side of this controversial issue of public importance--i.e., that however enjoyable, such smoking may be a hazard to the smoker's health." It does not specify the form or content of such programming; it does not provide that it be carried as part of or adjacent to the commercial; and

it does not specify the length or frequency of such broadcasts. These are all left to the good faith, reasonable judgment of the licensee upon the facts of a particular case.

The Cigarette Labeling Act is quite clear and specific as to the kind of administrative action it seeks to interdict. Insofar as it is relevant here the statute provides (Section 2) that it is "the policy of the Congress and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health"; and (Section 5(b)) that "no statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." (Emphasis added) ^{24/}

It is clear from Sections 2 and 5 that no other labeling requirement can be promulgated and no health warning can be required in cigarette advertisements by any Federal, State, or local authority. But, there is nothing in the language of the Act to indicate that other agencies cannot regulate other aspects relating to smoking and health. On the contrary, Section 5(c) leaves intact the FTC's authority to police unfair or deceptive practices in cigarette advertising. Similarly, almost every state has a law forbidding the sale of cigarettes to minors, and some have laws requiring smoking education campaigns to be presented in public

^{24/} The full text of the Act is appended to petitioners' briefs.

schools. These laws clearly concern smoking and health, and indeed make a judgment that smoking is adverse to health." No one seriously contends that these statutes have been suspended or overturned by the Cigarette Labeling Act.^{25/}

Petitioners' position requires a conclusion that the statute means a good deal more than it says; that by prohibiting regulations which would require statements "in the advertising" warning of health hazards, Congress meant to foreclose the Commission from considering such advertisements as constituting a use of the airwaves for the presentation of a controversial public issue within the meaning of 47 U.S.C. 315(a). Indeed under their view the Commission would be powerless to take any action designed to inform the public on the smoking question. We think that if Congress had intended such a result it could have found the words to express that intent. This Court should not be asked to rewrite the statute.

In our view, the statute as it stands would preclude the Commission from requiring that statements of health warnings be included "in the advertising" and possibly even adjacent to cigarette commercials. But plainly it does not foreclose other action with respect to the health issue. And specifically, it does not prevent the Commission from ruling that when they air cigarette commercials, broadcasters, as part of their obligation to operate

^{25/} See, e.g., Rep. Kornegay's remarks, 111 Cong. Rec. 16546.

in the public interest and to present conflicting views on issues of public importance, must devote a reasonable period of time to informing the public of the health hazards involved.

B. The Legislative History Shows No Intent By Congress To Foreclose The Commission From Ruling As It Did On The Applicability Of The Fairness Doctrine To Cigarette Commercials.

Petitioners base much of their argument on an assertion that the Commission has interpreted the words "in the advertising" of Section 5(b) too literally. They state that the Commission's ruling is in conflict with the intent of Congress on this score. But petitioners' contentions find no more support in the legislative history than they do in the plain language of the statute. Nowhere in either the House or Senate Reports and debates is there any indication that the words of Section 5(b) have any meaning other than that attributed to them by the Commission.^{26/} The legislative history shows that Congressional attention focused on the FTC's proposal to require health warnings in cigarette advertising. As part of the ultimate legislative compromise, a direct prohibition was entered against the FTC and all other agencies to keep them from adopting a rule like the FTC's. But there is no suggestion anywhere that on the question of cigarette

^{26/} S. Rept. No. 195, pp. 4-6; H.R. Rept. No. 449, pp. 2, 4-6; H.R. Rept. No. 586, pp. 5-6; 111 Cong. Rec. 13893, 13899, 13908, 13911, 13921, 13929, 14409, 14411, 14417, 14419, 14222, 14223, 15597, 16543, 16545, 16546, 16547, 16548.

usage, which is manifestly controversial, broadcasters were to be relieved of obligations imposed by the Communications Act and Commission policy.

The 1964 Surgeon General's Advisory Committee Report found a link between smoking and disease and recommended "remedial action." This occasioned a whole spate of legislative proposals in the 88th Congress.^{27/} Shortly after the issuance of the Surgeon General's Report, the FTC. issued a notice of rulemaking in which it proposed to adopt a rule requiring a health warning on cigarette packages and in cigarette advertisements.^{28/} By the first session of the 89th Congress, three alternative legislative approaches were discernible: (1) amending the Federal Food, Drug, and Cosmetic Act to provide for regulation of smoking products (H.R. 2248); (2) providing for a health warning and/or nicotine and tar contents on cigarette packages (S. 559, H.R. 3014, H.R. 4007, H.R. 7051 and H.R. 4244); and (3) giving the FTC. authority to regulate the labeling and advertising of cigarettes (S. 547). The Commerce Committees of both houses of Congress undertook extensive hearings on the subject of smoking and health.

Regarding the relationship between smoking and health, the Senate Committee concluded (S. Rept. No. 195, 89th Cong.,

^{27/} H.R. 4168, H.R. 7476, H.R. 9693, H.R. 9655, H.R. 9657, H.R. 9808, H.R. 5973, H.R. 9512, H.R. 9668, S. 2429 and S. 2430.
^{28/} 29 Fed. Reg. 530 (1964).

1st Sess., p. 3):

While there remain a substantial number of individual physicians and scientists--the Commerce Committee received testimony from 39 of them--who do not believe that it has been demonstrated scientifically that smoking causes lung cancer or other diseases, no prominent medical or scientific body undertaking a systematic review of the evidence has reached conclusions opposed to those of the Surgeon General's Advisory Committee.

The Commerce Committee, therefore, concurs in the judgment that "appropriate remedial action" is warranted.

The House Committee was not willing to opt for either medical opinion, but it did conclude that some remedial action was needed (H.R. Rept. No. 449, 89th Cong., 1st Sess., p. 3).

On balance, Congress appeared unwilling to embrace one or the other position, being concerned with not only the potential public health hazard but also with the possible economic impact on the tobacco, broadcasting and publishing industries.^{29/} Therefore a compromise was worked out whereby a health warning would be required on cigarette packages, but not in advertising, for a three year period during which the F.T.C. and H.E.W. would report to Congress on the effects of the labeling and various educational campaigns, etc. To this effect the Senate stated (S. Rept. No. 195, p. 5):

Considering the combined impact of voluntary limitations on advertising under the cigarette advertising code, the extensive smoking education campaigns now underway, and the compulsory warning

^{29/} See, e.g., H.R. Rept. No. 449, 89th Cong., 1st Sess., p. 3.

on the package, which will be required under the provisions of this bill, it was the committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking.

The House Committee felt the same way (H.R. Rept. No. 449, pp. 4,5).

Nowhere in the above-cited history is there any reference to the Commission's regulatory authority. Petitioners have, however, cited two specific references to broadcasting which, they assert, support their view that the Federal Communications Commission was to do nothing in this area. One was a statement by Senator Cotton during the floor debate reflecting his understanding of the bill before the Senate, i.e., "any restriction in the matter of advertising in magazines and on television and elsewhere should be held in abeyance." 111 Cong. Rec. 13899. The Senator's remarks as a whole, however, show that the restriction referred to was the F.T.C. proposal and that he shared the majority view that requiring a warning in the advertising itself, as the F.T.C. proposed, "would practically terminate" such advertising, and was too drastic a measure at this time. Senator Cotton's inclusion of "television" has no significance except to confirm what the Commission concedes, that no health warning can be required in televised cigarette commercials.

The second instance cited by petitioners is a dialogue between Surgeon General Terry and Senator Magnuson regarding the use of some \$2 million for an informational and educational

campaign to alert the public to the dangers in smoking.^{30/} The Senator asked about the use of public service time on television and radio stations, and Dr. Terry stated: "I do not believe that we have utilized this and I know of no specific plans to do this." Senator Magnuson then observed that "it will be up to the individual licensees to take it or not take it," and Dr. Terry replied:

That is right, sir. I think you must appreciate, Mr. Chairman, that there are quite a few other organizations who are vitally concerned about this problem and will be testifying before your committee that may very well propose this and, as a matter of fact, it is conceivable that the Interagency Council could wish to sponsor such public service advertising.

Nothing in this dialogue runs contrary to the Commission's ruling. It shows that a number of organizations including the Public Health Service, are seeking to inform the public on the perils of smoking and indicates that broadcasters would be under no obligation to air Public Health Service announcements. But the Commission did not require that government-endorsed material be used. Licensees can use government material, private material, or create their own in order to satisfy the fairness obligation. And if they choose not to carry cigarette commercials they need carry nothing at all on the subject.

Thus it can be seen that there is nothing in the legislative history of the Cigarette Act to preclude the Commission's ruling. Furthermore, Congress's intent is quite clearly to educate the

^{30/} Hearings before the Committee on Commerce on S. 559, S. 547, 89th Cong. 1st Sess. (1965), pp. 40-41.

public to the possible health hazards of smoking without taking an anti-smoking position. To this end, a labeling requirement was enacted and educational programs encouraged, while at the same time Congress prohibited restrictions in the advertising itself. As the following section of our brief shows, the Commission's ruling implements efforts directed at educating the public on the health question and is thereby fully consonant with the intent of Congress.

C. The Commission's Ruling Is Consistent With Congressional Policy Which Relies On Educational Campaigns To Advise The Public Of The Hazards Of Smoking.

As shown above, Section 5(b) of the Labeling Act precludes requiring a health warning in or adjacent to cigarette advertising. In reaching this result, Congress was mindful of educational campaigns being carried out to warn the public of the hazards of smoking. This was one reason why no health warning in the advertising itself was deemed necessary at this time. The Senate Report states (S. Rept. No. 195, 89th Cong., 1st Sess., p. 5):

Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package, which will be required under the provisions of this bill, it was the Committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking.

The House Report similarly states that the Cigarette Advertising Code and the educational and informational programs of HEW in combination

with the Labeling Act made it unnecessary to insert health warnings in cigarette advertising as proposed by the F.T.C. (H. Rept. No. 449, 89th Cong., 1st Sess., pp. 4, 5). Indeed, Congress has affirmatively supported such educational efforts, appropriating \$2 million to be used for this purpose by the Department of Health, Education, and Welfare (P. L. 89-156, 79 Stat. 589, 1965, R. 830).

The Commission's opinion catalogs and discusses in some detail the substantial educational campaign being conducted by the Public Health Service, the American Cancer Society, and other groups (R. 830-833). Included in this effort are spot announcements on radio and television. The Public Health Service reported in January, 1967, that it has distributed announcements to more than 900 radio stations and has approached television stations to obtain further coverage for its messages. The American Cancer Society has reported favorable responses from the national broadcast networks and many individual stations concerning the promotion of its spot announcements on smoking and health (R. 830).

The necessity for these and other efforts if, as Congress intended, these campaigns were to fully inform the public of the potential hazards to health which smoking may entail, is underscored by the June 30, 1967, report to Congress made by the F.T.C. pursuant to Section 5(d) of the Labeling Act. Citing the intensive appeals, particularly to the young, that appear in radio and television commercials, the Report states, p. 29: "To allow the American people, and especially teenagers, the opportunity to make an informed and deliberate choice of whether or not to start smoking, they must be freed from constant exposure to such one-sided blandishments and told the whole story."

Manifestly, the Commission's ruling will assist the efforts of public and private agencies and individuals to lay before the public all the facts with respect to cigarette smoking. Under the circumstances it makes no sense to argue, as petitioners do, that the ruling is at odds with national policy. Considering the affirmative efforts by Congress and by federal, state, and local public and private agencies to educate the public as to the smoking health hazards and particularly to discourage youth from forming the habit, it is difficult to see how the Commission, consistent with national policy, could have reached any other result than the one it did. ^{31/}

^{31/} The assertion that the Commission somehow precluded itself from making the ruling at bar when it commented on S. 547 and S. 559 in 1965, is without merit. The Commission stated at the time (S. Rept. No. 195, 89th Cong., 1st Sess., p. 13):

It seems clearly appropriate, however, that the matter of cigarette advertising be treated on an all-inclusive, across-the-board basis, rather than in a piecemeal fashion, etc.

There were also statements by the Commission that it had made no studies of the problem. However, all of these comments were made in light of the proposed comprehensive FTC rulemaking which would have required health warnings in all cigarette advertisements. Also, Section 5(c)(1) of S. 547, on which the Commission was commenting, would have mandated the FTC to require such health warnings. Because of these proposed across-the-board rules, and since the Commission's authority is limited to the broadcast media, no studies were made nor was any "piecemeal" regulation contemplated. These circumstances surely do not now block the Commission from ruling as it did. One, the FTC's proposed comprehensive rules never came to pass. Two, the Commission's ruling is consistent with the objectives of Congress. Three, no studies are needed on smoking and health to rule that both sides of a controversial issue must be presented. The importance of the smoking education campaigns to Congress and the developments since the Cigarette Act was passed led to the Commission's ruling. See, e.g., HEW Report to Congress, July 12, 1967; FTC Report to Congress, June 30, 1967; Surgeon General's Report on the Health Consequences of Smoking, 1967. It was clearly not precluded by the prior Commission position.

III. THE COMMISSION HAS THE AUTHORITY TO ADOPT
A STANDARD OF FAIRNESS WITH RESPECT TO THE
TREATMENT OVER THE AIR OF CONTROVERSIAL
ISSUES OF PUBLIC IMPORTANCE.

NBC and NAB make the sweeping claim that it is beyond the power of the Commission to require fairness in broadcasting, not only as to cigarette commercials but as to all matter carried over the air. NBC argues that no such authority was granted the Commission under the Communications Act (Br. pp. 31-34) and that in any event its exercise is unconstitutional (Br. pp. 34-54). NAB appears to concede the statutory basis for the Fairness Doctrine (though not as applied in this case), but joins NBC in arguing that it is an unconstitutional abridgment of First Amendment rights for the Commission to require stations to afford time for the airing of views at odds with those expressed in cigarette commercials (Br. pp. 61-67).

We believe that these arguments are largely foreclosed by this Court's recent decision in Red Lion Broadcasting Co. v. F.C.C., __ U.S. App. D.C. __, 381 F.2d 908 (1967), cert. granted __ U.S. __, where the Court concluded that the delegation of authority under which the Commission acted was sufficiently precise to meet constitutional standards, that the Doctrine is not fatally vague or indefinite, and that it does not impose an undue burden upon free speech. See also Office of Communication of the United Church of Christ v. F.C.C., 123 U.S. App. D.C. 328, 343, 359 F.2d 944, 1009 (1966), where it was observed that "adherence to the Fairness Doctrine is a sine qua non of every licensee." The Red

Lion opinion traces in considerable detail the growth and development of the Fairness Doctrine (see in particular 381 F.2d at 917-920) and for this reason we have not included such material in this brief. Likewise because the legal issues have been so recently considered by the Court, we think petitioners' arguments may be dealt with more briefly than might otherwise be the case.

It is recognized that while the "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" with the mode of expression, the special conditions of the medium may affect the "permissible scope of community control," Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-503. This precept applies with special force to broadcasting. Since the radio spectrum is limited, government may and must regulate access to it, awarding licenses and regulating licensees so as to promote "the larger and more effective use of radio." National Broadcasting Co. v. United States, 319 U.S. 190, 215-216, 226. One important aspect of this duty is to assure that the airwaves do not become monopolized by one point of view; that the relative handful of licensees which is all the spectrum can accommodate accords a fair hearing to competing positions on significant issues. See Red Lion Broadcasting Co. v. F.C.C., supra, and Office of Communication of United Church of Christ v. F.C.C., supra.

That is the essence of the Fairness Doctrine. It is wholly consistent with the First Amendment, which the Supreme Court

has declared "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Associated Press v. United States, 326 U.S. 1, 20. The refusal of a licensee to present both sides of an issue of public importance cannot be squared with this premise. The Fairness Doctrine contains no restriction upon the licensee's judgment in presenting any program or any view on any subject. The requirement of presenting other views does no more than preserve the public's right to be informed. In so doing, it promotes, not retards, the goals of free speech.

National Broadcasting Co. effectively precludes the broad arguments advanced here by NBC (Br. pp. 41-50) that under the First Amendment radio must be treated in the same fashion as a daily newspaper. Compare Near v. Minnesota, 283 U.S. 697 (1931) with National Broadcasting Co. As was said in Office of Communication of United Church of Christ v. F.C.C.:

A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts the franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. 123 U.S. App. D.C. at 337, 381 F.2d at 1003.

See also Massachusetts Universalist Convention v. Hildreth, 183 F.2d 497, 500 (1st Cir., 1950).^{32/}

^{32/} The argument that a radio station stands on the same footing as a newspaper has fared no better in Congress. See e.g. Hearings before a Senate Subcommittee on Interstate and Foreign Commerce, on S. 1333, 80th Cong., 1st Sess., p. 120, 126.

Nor can it be contended, as NBC and NAB urge, that broadcast stations are now so numerous that there is no further reason to adhere to the view, relied on by the Supreme Court in the NBC case, that the scarcity of broadcasting facilities warrants restrictions on the use of the airwaves. It was not the limited number of radio stations which prompted the adoption of the Communications Act of 1934, or its predecessor Radio Act of 1927 (44 Stat. 1162), nor was it the number of radio stations relative to the number of daily newspapers. It was rather that the number of radio stations was increasing so rapidly that the radio spectrum could not accommodate all who sought to use it, without disastrous interference. National Broadcasting Co. v. United States, 319 U.S. at 210-213.

This situation has not changed. Repeal of the Communications Act would still create chaos. The available spectrum space, which must accommodate many uses of radio in addition to broadcasting, is inadequate to meet existing demand, and new demands for spectrum space are constantly developing. The Director of Telecommunications Management, in an October 1966 Report on Frequency Management within the Executive Branch of the Government, stated (p. 13):

The rapid rate of growth in use of the radio spectrum has exceeded, by a substantive margin, the increase in the allocated spectrum, our capability to use the higher frequencies, our technology, and our administrative methods and facilities. In fact, technology has created desire for additional uses faster than it has produced means to solve the problem of electro-magnetic congestion. The part of the spectrum that we have learned how to use

is now fully allocated to important civil and Government needs and is congested in key parts.^{33/}

Within the broadcast field, in addition to the continuing need for regulation to prevent destructive electrical interference among stations, there is still a greater demand than availability of frequency space. The Commission's 1966 Annual Report thus speaks (p. 6) of "growing congestion" in the AM band, and during 1967 there were 73 comparative hearings in the broadcast field involving two or more applicants for the same frequency.^{34/} If anything, then, the necessity for control of the radio spectrum is even greater today than it was in 1927.

One major reason why a large block of frequencies has been allocated for broadcasting purposes is so that information on issues of public concern and importance can be disseminated.

^{33/} Thus, the more than 2-1/4 million transmitters operating in the land mobile service (which includes police, fire, conservation, industrial and transportation services), are now choked by congestion of the limited spectrum space available to them. "Unfortunately, though, there is no remaining unallocated space and giving more space to mobile use would require taking it away from some other service. The problem then becomes one of balancing conflicting requirements of all services and as apportionment of the available space in consideration of relative needs and importance." See F.C.C. Annual Report, 1966, pp. 48, 51, 136.

^{34/} When the Commission revoked the license of station KRLA in Pasadena, California, there were 16 applications by parties seeking to use the vacated frequency. Docket No. 15742, designated for rehearing on December 21, 1964, 30 Fed. Reg. 168. Eight applications were filed for St. Louis, Missouri, when the license of station KWK was revoked. Docket No. 17209, designated for hearing on February 21, 1967, 32 Fed. Reg. 3305. And when the license of television station KSHQ-TV, Las Vegas, Nevada, was rescinded, 7 parties sought the frequency. (Applications pending, not yet designated for hearing.)

The Commission emphasized in its Report on Editorializing the "right of the public to be informed" and stressed the critical role played by broadcasting in vindicating that right, 13 F.C.C. 1246, 1249 (1949). The Fairness Doctrine as here applied implements this purpose by insuring a fair treatment of the cigarette smoking issue and, consequently, a better informed body of public opinion.

In sum, it is well settled that the power of Congress over interstate commerce includes the power to regulate use of the airwaves and that this authority has been properly delegated to the Commission.^{35/} A requirement that, having permitted the extensive use of their facilities to promote cigarette smoking, broadcasters must advise their listeners of the hazards involved, is a clearly reasonable exercise of that authority. Indeed, as the Commission stated (R. 844), the matter quite literally may be one of life or death. Under the circumstances it is, we submit, well-nigh frivolous to contend that the Commission's action is barred by the Constitution.

^{35/} See National Broadcasting Co. v. United States, supra; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940); Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 276, 285 (1933).

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^{35/} See National Broadcasting Co. v. United States, *supra*; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940); Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 276, 285 (1933).

CONCLUSION

For the foregoing reasons, the Commission's orders under review in these appeals should be affirmed.

Respectfully submitted,

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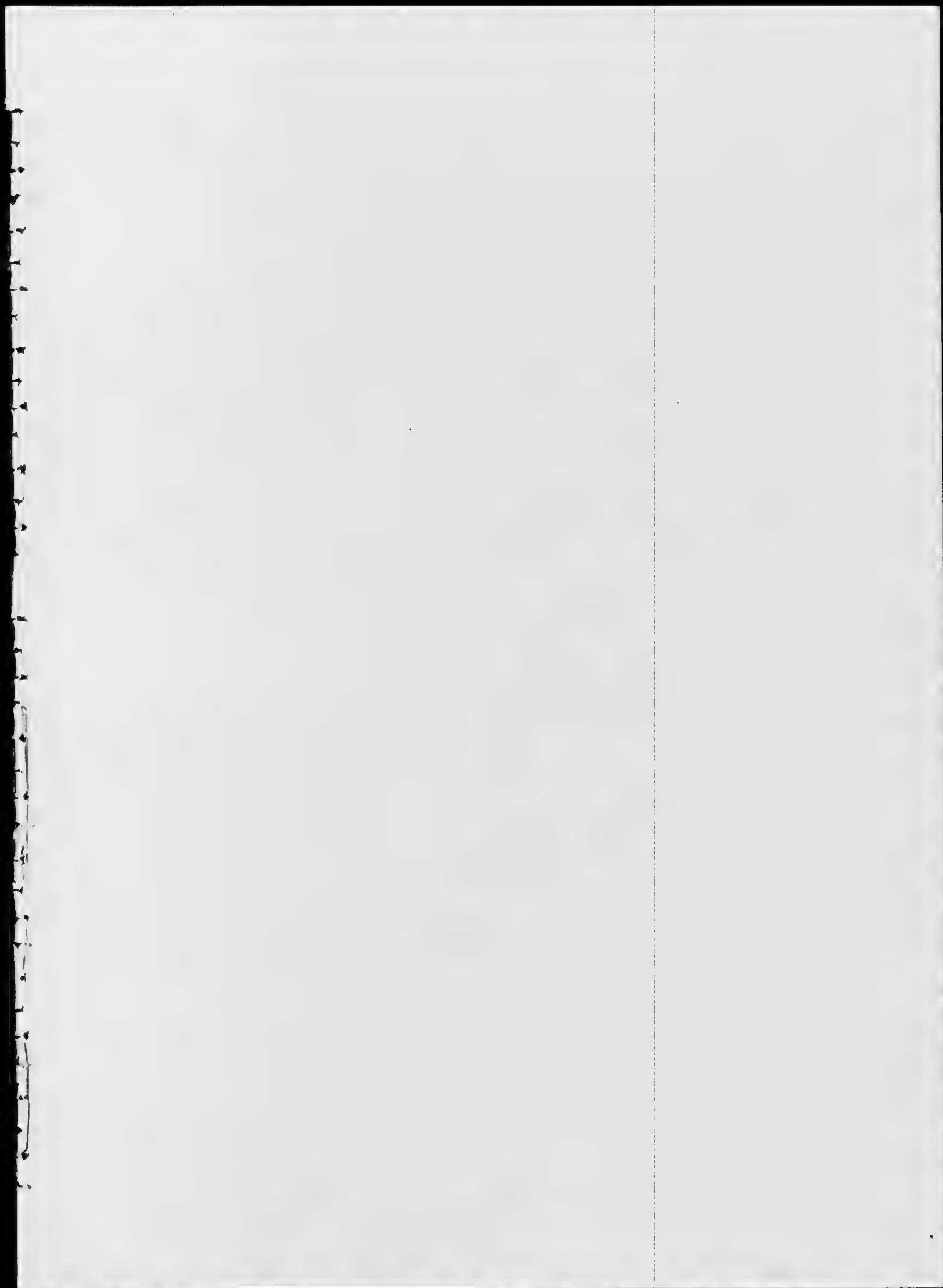
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April 22, 1968



BRIEF FOR THE TOBACCO INSTITUTE, INC., ET AL.

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,285, 21,525 & 21,526

JOHN F. BANZHAF III, *Petitioner,*

v.

**FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *Respondents,* and
WTRF-TV, Inc., and NATIONAL
ASSOCIATION OF BROADCASTERS, *Petitioners,***

v.

**FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *Respondents,*
THE TOBACCO INSTITUTE, INC., ET AL., *Intervenors.***

No. 21,577

THE TOBACCO INSTITUTE, INC., ET AL., *Petitioners,*

v.

**FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *Respondents.***

**Consolidated Petitions To Review Orders of the
United States Federal Communications Commission
for the District of Columbia Circuit**

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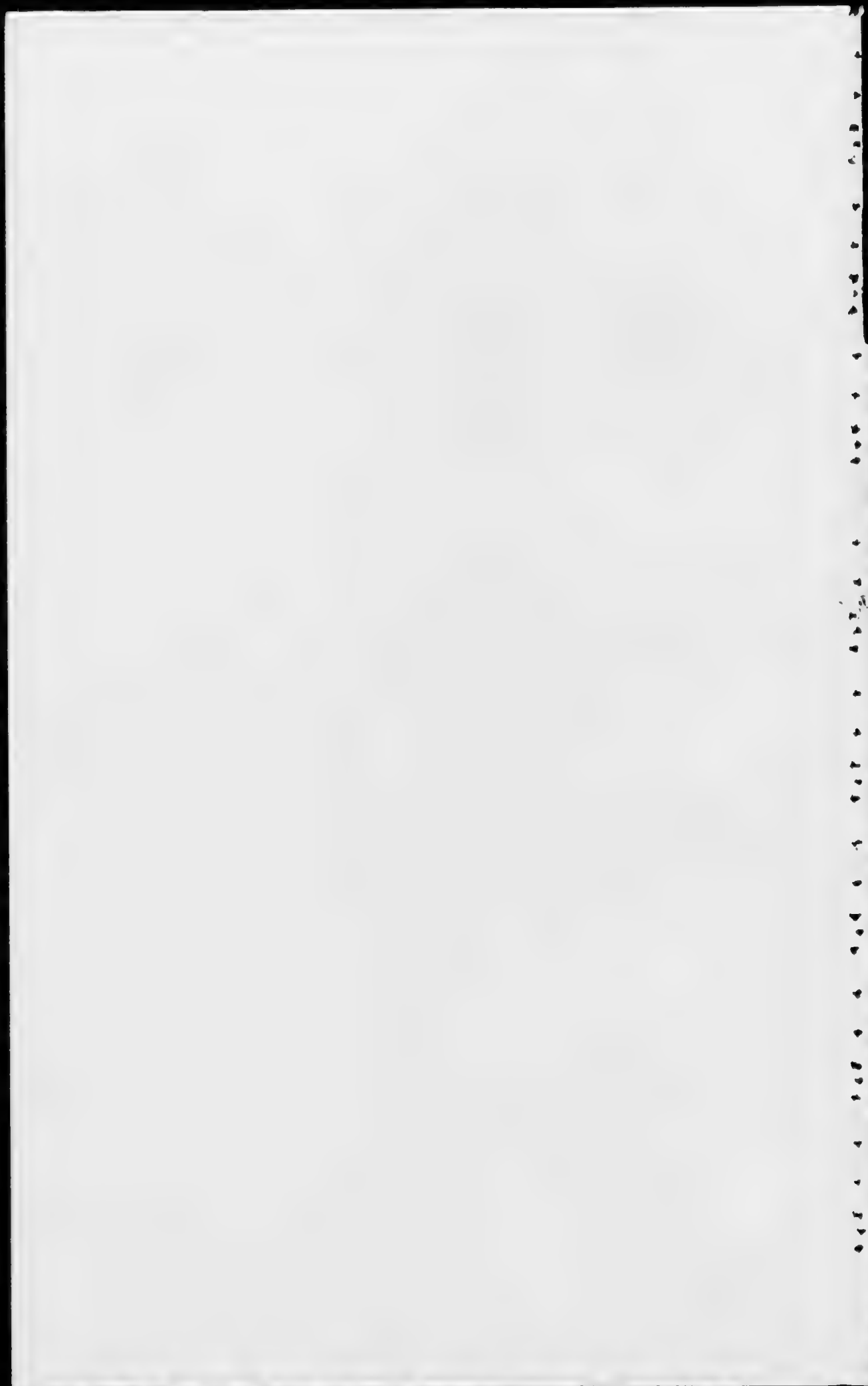
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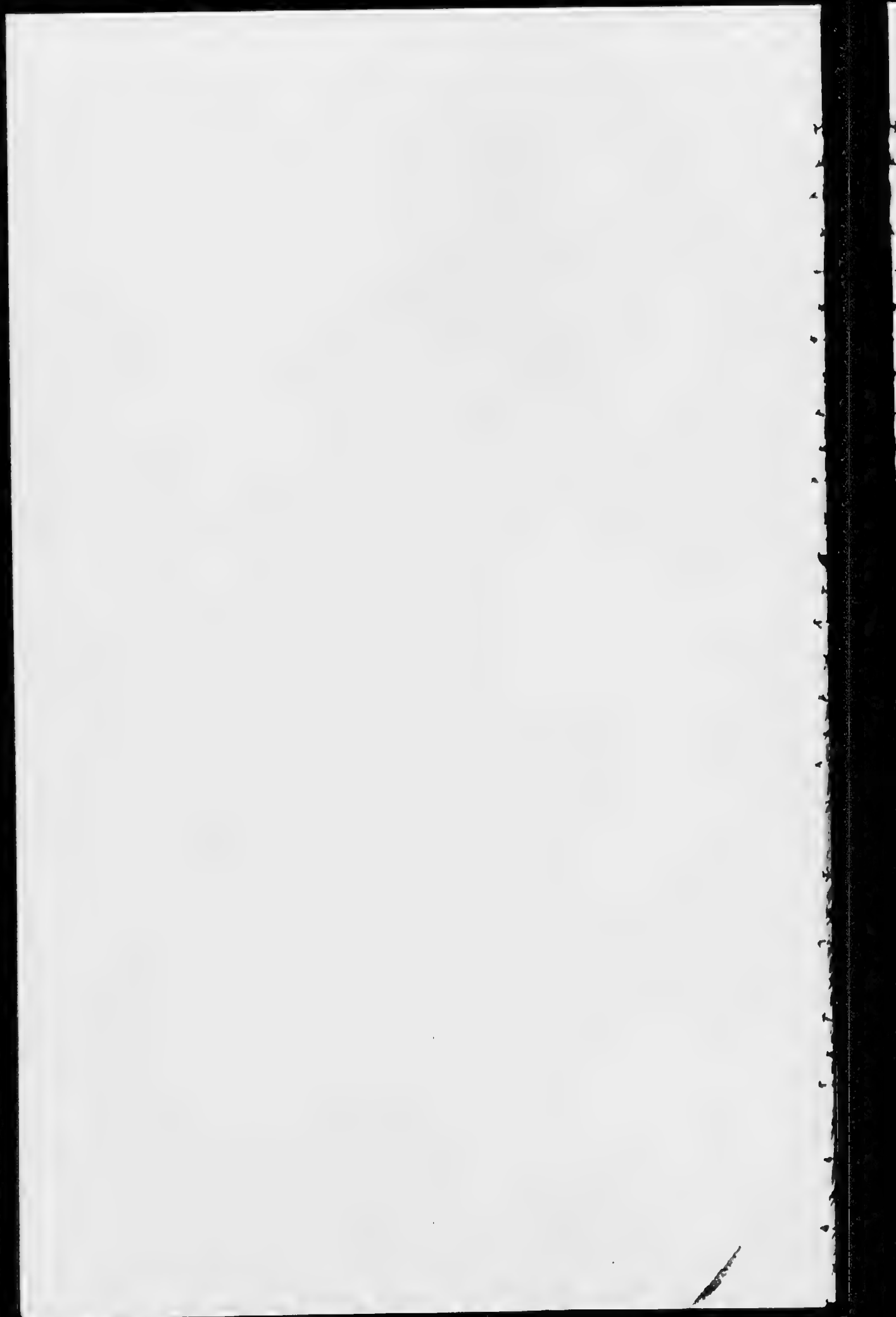
QUESTIONS PRESENTED

1. Whether the application of the FCC's "Fairness Doctrine" to cigarette product advertisements on radio and television is consistent with the Federal Cigarette Labeling and Advertising Act.

2. Whether the "Fairness Doctrine" may be validly applied to routine commercial product advertisements.

3. Whether the FCC validly applied the "Fairness Doctrine" in the present case to cigarette product advertisements, without examining a single such advertisement, on the assumption that all cigarette advertisements *per se* constitute the presentation of one side of the smoking-and-health controversy.

4. Whether the FCC improperly denied cigarette industry spokesmen the right of reply under the "Fairness Doctrine" to broadcasts presenting the view that cigarette smoking is a health hazard.



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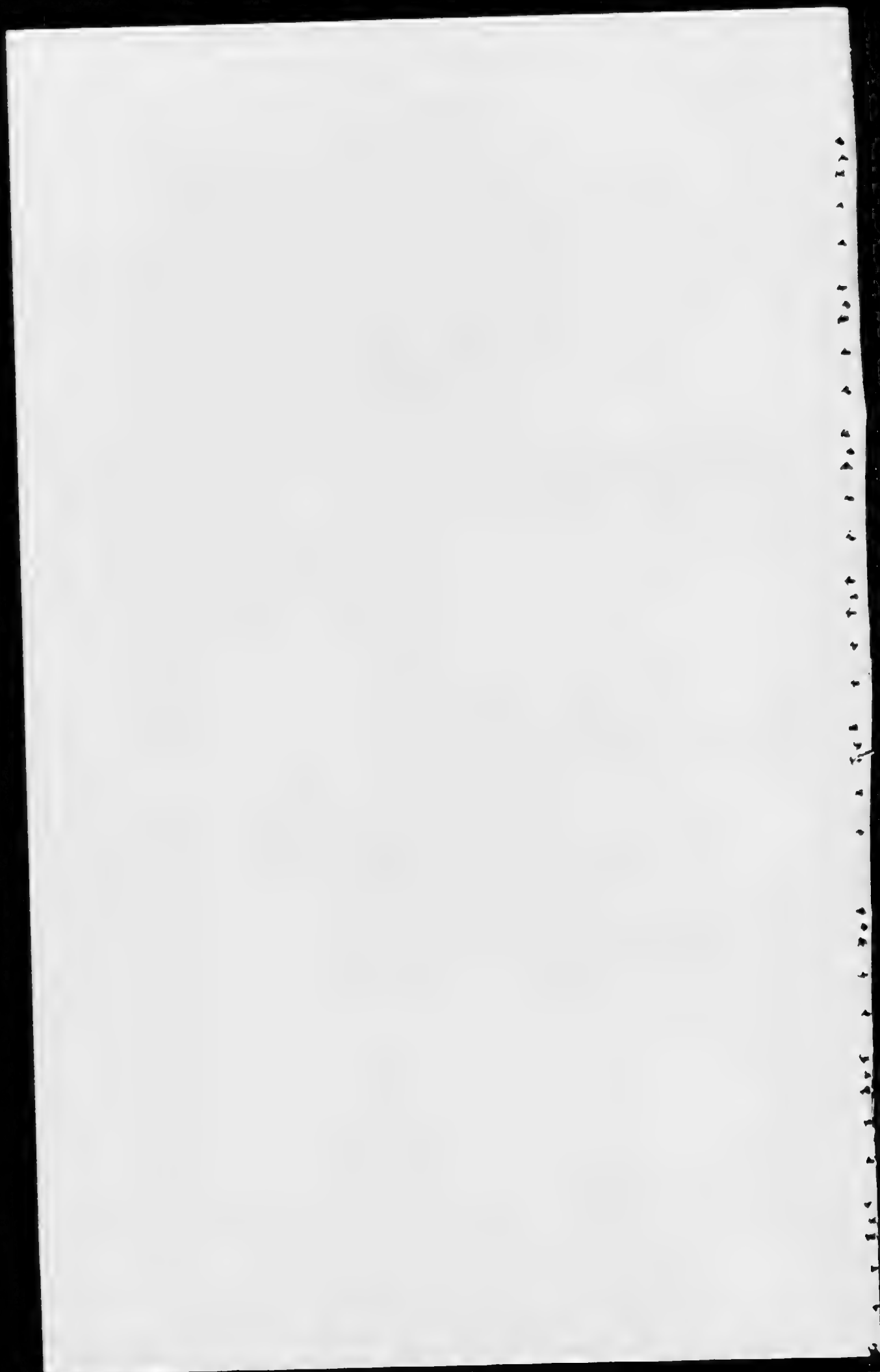
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,285, 21,525 & 21,526

JOHN F. BANZHAF III, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *Respondents,* and
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ASSOCIATION OF BROADCASTERS, *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *Respondents,*
THE TOBACCO INSTITUTE, INC., ET AL., *Intervenors.*

No. 21,577

THE TOBACCO INSTITUTE, INC., ET AL., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *Respondents.*

**Consolidated Petitions To Review Orders of the
Federal Communications Commission**

BRIEF FOR THE TOBACCO INSTITUTE, INC., ET AL.

JURISDICTIONAL STATEMENT

These are proceedings to review: (1) a ruling of the Federal Communications Commission contained in a letter of June 2, 1967, to Television Station WCBS-TV in New York

City (R. 15-17); (2) a memorandum opinion and order of the FCC of September 8, 1967, in which the Commission, on reconsideration, reaffirmed its letter ruling of June 2, 1967 (R. 814-74); (3) a so-called "clarification" of the memorandum opinion and order of September 8, 1967, contained in a letter from the FCC to Thomas J. Dougherty of Metromedia, dated September 21, 1967 (R. 881-84); and (4) a denial of reconsideration of this "clarification," contained in a letter from the FCC to The Tobacco Institute, Inc., officially released on December 21, 1967 (R. 895-97).

Petitioners, The Tobacco Institute, Inc., and eight cigarette manufacturers, became parties to the administrative proceeding before the FCC by filing petitions for reconsideration of the FCC's ruling of June 2, 1967.¹ (R. 352-67.) They received no notice of, or opportunity to participate in, the proceeding prior to that time. The FCC held them proper parties to the administrative proceeding in its opinion of September 8, 1967, denying reconsideration of the earlier ruling. (R. 815, n. 2.)

This Court, by order of January 19, 1968, granted the present petitioners intervention as of right in Nos. 21,285, 21,525 and 21,526. Petitioners also filed an independent petition for judicial review of the FCC's "clarification" of September 21, 1967, and its denial of reconsideration of this "clarification" of December 21, 1967 (No. 21,577). The latter petition was consolidated with these proceedings by order of this Court on February 1, 1968. Jurisdiction of

¹ The Tobacco Institute, Inc., a New York membership corporation, is a voluntary association of United States manufacturers of tobacco products, including six of the eight manufacturers which are petitioners. The eight cigarette companies joining in this brief are: The American Tobacco Company, Brown & Williamson Tobacco Corporation, Larus & Brother Company, Incorporated, Liggett & Myers Tobacco Company, P. Lorillard Company, Philip Morris Incorporated, R. J. Reynolds Tobacco Company, and United States Tobacco Company. Together these companies account for nearly all of the cigarettes manufactured in the United States. They promote the sale of their cigarettes, among other means, by paid advertisements over radio and television.

this Court to review these various decisions of the FCC is founded upon 47 U.S.C. § 402(a) and 28 U.S.C. § 2342; see *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908 (D.C. Cir.), *cert. granted*, 389 U.S. 968 (1967).

STATEMENT OF THE CASE

1. This case arose when petitioner Banzhaf, a New York lawyer, wrote a letter on his own behalf to television station WCBS-TV in New York on December 1, 1966. Banzhaf asserted that the "question of the advisability of smoking is clearly a controversial issue of public importance"; that cigarette advertisements—he referred in his letter to three specific commercials broadcast on November 24, 1966—constitute the expression of a point of view by the cigarette advertisers on this issue; and that the station was obligated under the FCC's "Fairness Doctrine" to grant free time, "roughly in proportion to that now spent on your station promoting the virtues and values of smoking," to responsible groups to present an anti-smoking point of view. (R. 3-5.) On December 20, 1966, Banzhaf wrote again to the station, stating that, as a prerequisite to filing a complaint with the FCC, he was requesting that free broadcast time be made available to him as a spokesman for an anti-smoking point of view. (R. 6.)

The station replied by letter of December 30, 1966, rejecting Banzhaf's request for free time. WCBS-TV pointed out that it had presented broad coverage of "the issue of the health ramifications of smoking." Under these circumstances, the station deemed it unnecessary to address itself to the question whether the "Fairness Doctrine" applies to product advertisements, although it stated that it did not believe the doctrine applicable. It said:

"We believe that it is clear that the fairness doctrine was conceived by the Commission as an aid to the public's right to be informed about public issues—not as a vehicle for giving the Commission power to indirectly regulate product advertising when other gov-

ernmental agencies are directly charged with the regulatory responsibility over such advertising." (R. 8.)

Banzhaf thereupon wrote to the FCC, complaining that WCBS-TV had failed to comply with the "Fairness Doctrine." He enclosed copies of his letter of December 1, 1966, and the station's reply, and requested that his complaint be investigated and that appropriate action be taken against the station. (R. 1-2.) No copies of the three advertisements specified by Banzhaf, nor of any other cigarette advertisements, accompanied this complaint.

Although it is the FCC's professed practice when a "Fairness Doctrine" complaint is made to give the licensee notice and opportunity to reply,² the FCC did not do so in this case. Instead, it sent the station a letter dated June 2, 1967, which it said constituted its ruling on the Banzhaf complaint. The FCC stated:

"We hold that the fairness doctrine is applicable to such advertisements. We stress that our holding is limited to this product—cigarettes. . . . We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health." (R. 16.)

The FCC, however, rejected Banzhaf's claim that the time to be afforded for this purpose should "roughly approximate" the time devoted to cigarette commercials. It did so on the ground that such a requirement would be inconsistent with the Cigarette Labeling and Advertising Act of 1965. (R. 16.) It said that stations carrying cigarette commercials would be required "to provide a significant amount of time for the other viewpoint." (*Id.*)

² "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance." 29 Fed. Reg. 10416, 2 R.R. 2d 1901, 1905 (1964) (hereafter "Fairness Primer").

It further indicated that stations had a duty to allocate "a sufficient amount of time . . . each week to cover the viewpoint of the health hazard posed by smoking." (R. 17.)

2. This ruling—made without any notice or opportunity to be heard, either to WCBS-TV or any other interested party—led to the filing of a number of petitions for reconsideration and for a stay of the ruling pending reconsideration. These petitions challenged the legality of the FCC's ruling on various constitutional, statutory, and public policy grounds, as well as the procedures by which it was reached. (*E.g.*, R. 352-367, 403-500.) Some parties also asked the FCC to inaugurate a formal rule-making proceeding to give systematic consideration to the question whether to extend the "Fairness Doctrine" to product advertising. (R. 167-201.)

On September 8, 1967, without having conducted an evidentiary hearing or having heard oral argument, the FCC issued a new opinion and order, denying reconsideration of its June 2, 1967 ruling, declining to stay its effectiveness, and refusing to consider the matter in a rule-making proceeding. (R. 814-74.) The FCC conceded, however, that "the ruling constitutes a precedent on an important issue which will affect licensees other than WCBS-TV and may necessitate a change in the operations of some." It therefore decided "for reasons of equity" that the conduct of licensees with respect to applying the "Fairness Doctrine" to cigarette advertising prior to the opinion and order of September 8, 1967, would not be considered in connection with license renewal applications. (R. 816.)

The FCC defined the "controversial issue" invoking application of the "Fairness Doctrine" as follows: "that however enjoyable, such smoking may be a hazard to the smoker's health." (R. 815.) It reiterated this formulation of the issue at several points: "the health issue" (R.

838); "here the controversial issue posed is one of health hazard" (R. 844); "the smoking-health issue" (R. 848).

The FCC ruled that cigarette advertising expresses a point of view on this issue, without even considering the contents or character of the particular advertisements cited in the complaint.³ It asserted that:

"we do not think that the text of the particular advertisements was necessary to our ruling or to our decision on the requests for reconsideration." (R. 851.)

The FCC rejected the constitutional attacks on the "Fairness Doctrine," relying on its own earlier decision with respect to the "Fairness Doctrine" in the context of its so-called "personal attack" rules and on the decision of this Court in *Red Lion Broadcasting Co. v. FCC*, *supra*. It found statutory authority for its construction and application of the "Fairness Doctrine" in the obligation of licensees to operate in the "public interest" and in the ostensible adoption of the "Fairness Doctrine" by Congress in the 1959 amendment to Section 315 of the Communications Act, 47 U.S.C. § 315. It declared that these provisions apply to commercial advertising as well as to other forms of programming. (R. 819-823.)

The FCC conceded that the Cigarette Labeling and Advertising Act of 1965 would preclude it from prohibiting cigarette advertising on radio and television, or requiring inclusion of a health warning in or adjacent to a cigarette advertisement, or compelling a grant of time by licensees for presentation of antismoking views roughly approximate to the time devoted to cigarette advertising. It never-

³ In its petition for reconsideration, NBC had attached the text of three advertisements which appeared to be those mentioned in Banzhaf's letter of December 1, 1966. None of these advertisements stated that smoking is not a health hazard or represented that smoking is beneficial to health or that the brand of cigarettes advertised was "less hazardous" than others. (R. 416-20.)

theless asserted that the Act did not preclude it from requiring broadcasters to afford "a significant amount of time" to anti-smoking advocates. It justified this result principally on the ground that the Act's legislative history refers to "smoking education campaigns" and that Congress has appropriated money for use by the Department of Health, Education and Welfare in disseminating information about smoking and health. (R. 824-837.)

The FCC also declared:

"our ruling applies only to cigarette advertising, and imposes no Fairness Doctrine obligation upon petitioners with respect to other product advertising." (R. 847.)

It rationalized this singling out of cigarette advertising on two grounds: (i) there are governmental and private reports and Congressional action with respect to the possible hazards of smoking; and (ii) these assert that "normal use of this product can be a hazard to the health of millions of persons." (R. 846.)

In response to the procedural objections to the manner in which it had arrived at its decision of June 2, 1967, the FCC asserted that its consideration of the pleadings filed after that decision met the requirements of due process. It also stated that any procedural defects would be cured by giving its ruling only prospective effect. Although the ruling is applicable to all licensees, the FCC said that formal rule-making would serve no useful purpose. (R. 849-852.)

Commissioner Loevinger, concurring in the order of September 8, 1967, emphasized that he did so despite "doubts that the action is procedurally and substantively consistent with controlling legal rules." (R. 861.) He found the FCC's affirmation of statutory authority for its action "most dubious"; warned that extension of the "Fairness Doctrine" to product advertising "is likely to lead either

to its attenuation to the point of ineffectiveness or its broadening to a scope that is wholly unworkable"; and said that "the Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health." (R. 863.)

He also remarked that the FCC had failed "to come to grips with the issue posed by the Cigarette Labeling Act" and that its construction of the Act was "strained and unconvincing." (R. 865.) He concluded that the ruling was "the result of sentiment rather than conviction" (R. 866) and reluctantly concurred in the result solely because of his belief that cigarette advertising encourages young people to smoke, and it was "desirable that all legal and practical steps be taken to discourage smoking." (R. 865.)

3. In elaboration of its holding that cigarette advertising raises a controversial issue of public importance under the "Fairness Doctrine," the FCC made a further important ruling in its opinion of September 8. It stated:

"We see no inequity in the circumstance that cigarette advertisers are precluded by various codes from making affirmative health claims in the advertising programming. *The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials.*" (R. 842.) (Emphasis supplied.)

The FCC thereafter received a request from a broadcaster, Metromedia, Inc., for "clarification" of this portion of its opinion of September 8. (R. 888) Without prior notice to any of the parties to the proceeding or to any other person, the FCC withdrew the sentence of its opinion stating that licensees have this obligation and said:

"a licensee who has carried cigarette commercials has extensively covered one side of the issue on behalf of

the cigarette companies, so that when he presents a significant amount of time devoted to the other side . . . he is under no obligation to present further materials on the first (pro-smoking) side requested by these companies or their spokesmen"⁴ (R. 883.)

The Tobacco Institute petitioned for reconsideration of this "clarification," contending that there is no basis for the FCC's conclusion that cigarette commercials present one side of the smoking and health issue and that if a licensee broadcasts the view that smoking is hazardous to health, the "Fairness Doctrine" itself should require giving the cigarette companies time to reply to this view. (R. 889-94.) The FCC declined to reconsider its "clarification"; it added only the following statement:

"The hypothetical situation of a station which presents health hazard claims but no cigarette commercials obviously raises a factor different from that considered in our response to Metromedia, whose inquiry assumed that cigarette commercials had been carried. Whether time must be afforded in the hypothetical circumstances you suggest is a matter which would be governed by the same principles as are applicable generally under the "Fairness Doctrine." (R. 897.)

STATUTES INVOLVED

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 73 Stat. 557 (1959), 47 U.S.C. § 315 (a), and the full text of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. §§ 1331-39, are set forth in Appendix A.

⁴ Commissioner Loevinger concurred in this action, but added: "since the Commission opinion [of September 8, 1967] is confused, ambiguous, loosely reasoned and certain to engender difficulties, . . . I think it would be preferable to withdraw the Commission opinion and issue one less prolix and logically more rigorous to deal with this subject." (R. 884.)

STATEMENT OF POINTS

1. The Federal Cigarette Labeling and Advertising Act precludes the FCC's ruling that the "Fairness Doctrine" is applicable to cigarette product advertising.

2. Irrespective of the Federal Cigarette Labeling and Advertising Act, the present ruling applying the "Fairness Doctrine" to cigarette product advertising exceeds the FCC's statutory and constitutional authority, and is procedurally defective.

3. Even if the "Fairness Doctrine" may be validly applied to cigarette product advertisements, the FCC's ruling that cigarette industry spokesmen are not entitled to time under the "Fairness Doctrine" to reply to broadcasts presenting the view that cigarette smoking is a health hazard is invalid.

STATEMENT OF THE ISSUES AND SUMMARY OF ARGUMENT

These proceedings raise novel and important questions as to the construction, application and validity of the so-called "Fairness Doctrine" of the Federal Communications Commission in relation to commercial product advertising on radio and television. In essence, the FCC has held, in the decisions of which these petitioners seek review, that:

(1) The "Fairness Doctrine" is applicable to cigarette product advertising and requires licensees who carry any cigarette commercials to provide a significant amount of air time free of charge on a regular basis for presentation of the point of view that cigarette smoking may be a hazard to the smoker's health; (2) licensees who broadcast cigarette commercials and grant a significant amount of time to spokesmen for the view that smoking may be hazardous to health are not obligated under the "Fairness Doctrine" to afford reply time free of charge to spokesmen for the view that cigarette smoking has not been scientifically proved hazardous to health.

The FCC has made a sweeping and unprecedented extension of the "Fairness Doctrine" into the area of commercial product advertising. Furthermore, it has singled out the advertising of a single product, cigarettes, for this application of the "Fairness Doctrine." In doing so, it has also transformed the "Fairness Doctrine" from a flexible standard—originally geared to case-by-case application in specific factual settings by licensees exercising judgment and discretion—into a *per se* rule dictating licensee behavior with respect to all cigarette advertising. It has asserted authority over cigarette product advertising, although this matter is governed by Congressional legislation of preemptive character. And the FCC has applied the "Fairness Doctrine" so as to deprive cigarette manufacturers of the effective right to reply to their critics, a right which had been safeguarded by the doctrine itself as previously formulated.

This Court is called upon to decide whether these actions by the FCC are lawful exercises of the powers granted to this agency by Congress.

I

The application of the "Fairness Doctrine" to cigarette advertising is barred by the Federal Cigarette Labeling and Advertising Act.

The Act represents a studied legislative compromise, which is disrupted by the FCC's ruling in the present case. Urged by some to regulate both cigarette labeling and advertising and by others to regulate neither, and faced with divergent views as to the alleged health hazards of smoking and as to which agency of government should be in charge of any regulation in this area, Congress adopted a middle-ground position.

First, Congress enacted a "comprehensive Federal program to deal with cigarette labeling and advertising

with respect to any relationship between smoking and health." In so doing, Congress adopted an "across-the-board" approach and precluded "piecemeal" regulation by any federal administrative agency or state or local government. Significantly, the FCC, when asked to express its views on pending bills, acknowledged its own limited jurisdiction and stated that it was "clearly appropriate . . . that the matter of cigarette advertising be treated on an all-inclusive, across-the-board basis, rather than in a piecemeal fashion."

Second, instead of the polar positions urged upon it, Congress required a caution notice on cigarette package labels but held the regulation of cigarette advertising in abeyance. Congress specifically provided that no statement relating to health should be required in cigarette advertising. In reaching this accommodation, Congress clearly rejected the premise, which underlies the FCC's present ruling, that cigarette product commercials must be counterbalanced by other advertising with health-warning messages. Congress unequivocally determined that the prescribed cautionary statement on cigarette package labels constituted "adequate warning" of any health hazards that might be connected with cigarette smoking.

The FCC acknowledges that the Labeling Act precludes it from requiring a cessation of cigarette advertising on the air, or from requiring a health warning "in or adjacent to" cigarette commercials or from ordering licensees to afford anti-smoking advocates time "roughly approximate" to that devoted to cigarette commercials—even though none of these prohibitions is expressly stated in the Act. It is clear that all these restrictions on the FCC's power—as well as a restriction on the asserted power to require licensees to accord a "significant amount of time" to anti-smoking advocates—are required in order to effectuate the purpose of the Act.

The FCC's ruling cannot be squared with the Act on the ground that the ruling implements the "smoking education campaigns" referred to in the legislative history of the Act. The Senate Report in question referred to "the extensive smoking education campaigns *now underway*"; no "educational" campaign of the sort involved in the present ruling was even remotely contemplated at the time the Act was passed. In any event, no regulation of cigarette advertising may properly be justified by reference to the "educational" campaigns cited by Congress. These campaigns were expressly mentioned by Congress as a reason to *refrain* from regulating cigarette advertising.

II

Even if the Labeling Act did not preclude the FCC's action in this case, there is no rational basis in the purpose and history of the "Fairness Doctrine" for applying the doctrine to routine advertising of commercial products.

The FCC created the "Fairness Doctrine" to help bring about an informed public opinion on vital issues through the complete and balanced presentation and discussion of conflicting points of view. From the time of its first systematic formulation in 1949 until the present case, the FCC never indicated that the "Fairness Doctrine" applies to advertising solely designed to sell a commercial product. The doctrine, in accord with its underlying purpose, was always regarded as directed to programming which involves the reasoned discussion of public issues.

Routine product advertising does not constitute the deliberative presentation of one side of a controversy which should trigger the operation of the "Fairness Doctrine." The FCC's decision is likely to lead merely to contending "spot" announcements, in which licensees try to discharge the obligation imposed on them by the FCC by repetitive "spot" warnings about the purported hazards of smoking. Such a battle of the "spots" would

not enhance public understanding of important controversies, which is the object of the "Fairness Doctrine."

There is no rational basis for the FCC's announcement that the "Fairness Doctrine" will be applied only to cigarette advertisements. Cigarette advertising cannot logically be differentiated from other product advertising in application of the "Fairness Doctrine." There are controversies of public importance over many products. If cigarette advertising automatically invokes the "Fairness Doctrine," so would advertising for these other products. The result will be a distortion of programming, with licensees required to devote substantial portions of air time to these multifarious product controversies.

The FCC's singling out of cigarette advertising for application of the "Fairness Doctrine" is arbitrary and discriminatory. It is clear that the FCC has made a judgment in favor of the anti-smoking viewpoint in the controversy over smoking and health and that is why it has selected cigarette advertising for this special treatment. But the FCC has no authority to take sides on the merits of a controversy in determining the applicability of the "Fairness Doctrine," as it has always recognized prior to this case.

III

Even if the FCC were authorized to apply the "Fairness Doctrine" to routine commercial advertising in some circumstances, its application to cigarette advertising in the manner exhibited by the present case cannot be justified.

The FCC has treated any and all cigarette advertising as presenting a viewpoint on the issue of smoking and health without regard to what such advertisements actually say. The FCC did not even consider the three advertisements which formed the basis of the original complaint to be relevant to its decision. This application of the "Fairness Doctrine" runs counter to its previous decisions,

which always looked to the specific factual setting to determine whether the doctrine applied. Moreover, the FCC had previously held that explicit presentation of a point of view on a controversial issue is necessary to trigger the "Fairness Doctrine." In the present case, however, the FCC in effect held that all cigarette advertising *per se* presents such a point of view.

There is no factual support for such a conclusion. The FCC announced its far-reaching decision in this case without a rule-making proceeding, without soliciting the views of interested parties, without hearings or oral argument, and without even giving the party originally complained against notice of the complaint and an opportunity to reply. The FCC relied for its conclusion as to the character of cigarette advertising on the report of another agency, the FTC; but this report—filed *after* the FCC's initial ruling in this case—depends on premises which were rejected by Congress in passing the Labeling Act and was itself the product of an *ex parte* proceeding.

The advertisements which formed the basis of the original complaint in this case do not express any viewpoint on the smoking and health issue. Nor is there any evidence that other current cigarette advertisements do so. The FTC, which asserts its power to act against any cigarette advertisements making health claims, has not brought any proceedings in recent years alleging that any cigarette advertisements make such claims. Moreover, broadcasting codes themselves prevent the broadcasting of advertisements making health representations.

In the absence of any first-hand examination of current cigarette advertising by the FCC and any evidence to support its conclusion as to the character of this advertising, its application of the "Fairness Doctrine" in the circumstances of this case cannot stand.

IV

Even if the FCC's construction and application of the "Fairness Doctrine" to cigarette advertising were valid, the FCC has erred in denying cigarette manufacturers the right to reply to broadcasts expressing the view that smoking is hazardous to health.

In its September 8 opinion, the FTC expressly stated that cigarette manufacturers must have that right, to assure "fairness" in the application of the "Fairness Doctrine" to cigarette advertising. On September 21, the FCC reversed itself in its purported "clarification"—again acting without notice or opportunity to be heard to any party.

In denying cigarette manufacturers their right of reply, the FCC clearly proceeded on the same erroneous notion that any and all cigarette advertisements express a point of view on the smoking and health issue. It compounded this fallacy by further concluding that such advertisements are a complete presentation of the manufacturers' side of the issue, so that a licensee which has broadcast cigarette commercials has no further obligation under the "Fairness Doctrine" to let the manufacturers be heard. But cigarette commercials—even if they could be regarded as expressing an implicit viewpoint on the smoking and health issue, which they do not—are certainly not an explicit and complete presentation of the manufacturers' side of the issue. If the "Fairness Doctrine" applies to cigarette product commercials, the FCC must recognize the right of cigarette manufacturers or their spokesmen to air time on the same terms and conditions as their opponents, in order that the public shall receive a complete presentation of both sides of the issue.

ARGUMENT

I. THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT PRECLUDES THE APPLICATION OF THE "FAIRNESS DOCTRINE" TO CIGARETTE ADVERTISEMENTS

In enacting the Federal Cigarette Labeling and Advertising Act (79 Stat. 282 (1965), 15 U.S.C. §§ 1331-39),⁵ Congress clearly intended to preclude, until July 1, 1969, any administrative agency regulation of cigarette advertising such as that issued by the FCC in the present case.

Basically, the Act represents a studied legislative compromise between two polar views. Prior to the Act's passage, some persons advocated extensive regulation of both cigarette labeling and advertising; others contended that there was no need for any regulation of either labeling or advertising. There was also disagreement as to which agency of government should be responsible for any regulation which might be authorized.

Faced with the complex issues relating to cigarette labeling and advertising and the conflicting scientific opinions regarding the alleged health hazards of smoking, Congress undertook to strike a deliberate balance between the competing interests involved. The essential ingredients of this accommodation—involving a differentiation between package labeling and advertising—were: (i) a uniform federal program under the control of Congress; (ii) a specific caution notice on the labeling of all cigarette packages; and (iii) a moratorium until July 1, 1969, on any regulation of cigarette advertising with respect to smoking and health.

The Congressional compromise embodied in the Act is epitomized in the Act's "Declaration of Policy" (§ 2, 15 U.S.C. § 1331), which provides as follows:

"It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal

⁵ The complete text of the Act is set forth in Appendix A, *infra*.

program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) *commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.* (Emphasis supplied.)

The Act requires that all packages of cigarettes distributed domestically bear the following legend on the label: "Caution: Cigarette Smoking May Be Hazardous To Your Health." (§ 4, 15 U.S.C. § 1333.) Under the caption of "Preemption," the Act prohibits the requirement of any other statement relating to smoking and health on cigarette packages (§ 5(a), 15 U.S.C. § 1334(a)). With regard to advertising the statute provides that:

"No statement relating to smoking and health shall be required in the advertising of any cigarettes, the packages of which are labeled in conformity with the provisions of the Act." (§ 5(b), 15 U.S.C. § 1334(b).)

The Act further states that "the provisions of this Act which affect the regulation of advertising shall terminate on July 1, 1969" (§ 10, 15 U.S.C. § 1339.)⁶

⁶ The statute also requires periodic reports to Congress from the Department of Health, Education and Welfare concerning "current information on the health consequences of smoking" and from the Federal Trade Commission concerning "the effectiveness of cigarette labeling" and "current practices and methods of cigarette advertising and promotion." (§ 5(d), 15 U.S.C. § 1334(d).) These periodic reports may also contain "such recommendations for legislation as [the reporting agency] may deem appropriate." (*Id.*) The first of these required reports were transmitted to Congress by the FTC on June 30, 1967, and by HEW on July 12, 1967.

We submit that the FCC's decision in the instant case violates the Congressional purpose expressed in the Preamble and incorporated in the body of the Act. As we discuss below, the ruling is at odds (i) with the Congressional determination that the statute itself "establish[ed] a comprehensive Federal program" in this area, and (ii) with the statutory prohibitions relating to the regulation of advertising, given the requirement of a caution notice on the label.

A. The Legislative History of the Act Makes Clear That Congress Intended To Bar Any Regulation of Cigarette Advertising Such as That Adopted by the FCC in This Case

It has been aptly observed that "since the legislature seldom sacrifices all competing interests to the complete accomplishment of a single purpose, the courts are often called upon to find the point at which a line was drawn, because there pursuit of one purpose encountered other interests which required a halt" ⁷ An examination of the historical background of the Cigarette Labeling and Advertising Act makes clear that the line drawn by Congress plainly "require[s] a halt" short of the extension of the "Fairness Doctrine" to cigarette advertising.

On January 11, 1964, a special Advisory Committee to the Surgeon General issued its *Report on Smoking and Health*.⁸ One week later, the Federal Trade Commission issued a notice of a proceeding relating to adoption of proposed trade regulation rules which would have regulated the content of cigarette advertisements and required a statement to the effect that cigarette smoking is "dangerous to health" in all cigarette advertising and on all cigarette

⁷ Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370, 380 (1947).

⁸ U.S. Dept. of Health, Education and Welfare, *Smoking and Health—Report of the Advisory Committee to the Surgeon General of the Public Health Service* (1964).

packages.⁹ The Congressional proceedings which ultimately resulted in passage of the statute involved here began shortly thereafter.

The numerous complex issues involved in regulating cigarette labeling and advertising were exhaustively canvassed in weeks of hearings before Congressional committees¹⁰ and during extensive debates on the floors of both Houses of Congress.¹¹ During these proceedings, a wide spectrum of legislative proposals was presented. A number of bills would have required an explicit health warning both on all cigarette packages and in all cigarette advertisements.¹² Other bills would have authorized one or another federal administrative agency to regulate cigarette labeling and advertising.¹³ Yet another group of bills would have required a caution notice on all cigarette packages but would have barred, for an indefinite period, any governmental regulation of cigarette advertising.¹⁴ In addition, vigorous arguments were presented for the view that neither labeling nor advertising regulation regarding smoking and health was then warranted because, *inter alia*, there was no scientific proof that

⁹ 29 Fed. Reg. 530-32 (1964).

¹⁰ *Cigarette Labeling and Advertising*, Hearings before the House Committee on Interstate and Foreign Commerce, 88th Cong., 2d Sess. (1964) (hereafter "1964 House Hearings"); *Cigarette Labeling and Advertising—1965*, Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2248, 3014, 4007, 7051, and 4244, 89th Cong., 1st Sess. (1965) (hereafter "1965 House Hearings"); *Cigarette Labeling and Advertising*, Hearings before the Senate Committee on Commerce on S. 559 and 547, 89th Cong., 1st Sess. (1965) (hereafter "1965 Senate Hearings").

¹¹ 111 Cong. Rec. 13892-926, 13928-32, 14408-25, 15597-98, 16540-49 (1965).

¹² *E.g.*, H.R. 9655, 88th Cong., 2d Sess.; S. 547, 89th Cong., 1st Sess.

¹³ *E.g.*, H.R. 9808, 88th Cong., 2d Sess. (Federal Trade Commission); H.R. 2248, 89th Cong., 1st Sess. (Food and Drug Administration).

¹⁴ *E.g.*, H.R. 3014, 89th Cong., 1st Sess.

smoking was a cause of disease, and in any event, the public was already well informed as to any alleged hazard.¹⁵

Congress resolved these conflicting arguments and proposals by a compromise. Senator Cotton, one of the senior members of the Senate Commerce Committee, summed up the compromise in these terms:

“ . . . [I]t was [my] understanding . . . —and I believe that view was clearly shared by the overwhelming majority of the members of the Committee on Commerce—that at this time Congress should go only to the point of placing a plain and effective warning on each package of cigarettes, and that *any restriction in the matter of advertising in magazines and on television and elsewhere should be held in abeyance* until such time as Congress and the [Federal Trade] Commission and the medical authorities complete their analysis of the problem and until we know how effective the warning on the package should prove and how effective the voluntary code adopted by the tobacco industry would be in dealing with this problem.”¹⁶

(i) **The FCC's Ruling Is Inconsistent With the Decision of Congress to Preclude Piecemeal Administrative Regulation of Cigarette Advertising.**

During the legislative proceedings, various federal agencies expressed divergent views with respect to the smoking and health issue. Certain agencies urged that the regulation of cigarette labeling and advertising should be placed in their own hands; others recommended that no such regulation was warranted. Congress adopted none of these approaches. Instead it assumed for itself control over the regulatory measures which it deemed appropriate.

¹⁵ See, e.g., 1964 House Hearings, pp. 169-72, 200-02; 1965 Senate Hearings, pp. 244-47, 351-61, 795-99, 949-56; 1965 House Hearings, 281-87, 337-43, 358-74, 410-15. 111 Cong. Rec. 14410, 14418-19 (1965).

¹⁶ 111 Cong. Rec. 13899 (1965). (Emphasis supplied.) The code referred to is discussed in n. 40, *infra*.

During the 1964 House Hearings, Chairman Dixon of the FTC recommended that Congress defer action on any legislation to regulate cigarette advertising or labeling "until it has had the opportunity to consider in detail the Commission's" trade regulation rule, which required insertion of a caution notice in all cigarette advertising and on all labeling to the effect "that cigarette smoking is dangerous to health and may cause death from cancer and other diseases."¹⁷ (1964 House Hearings, p.74.) At the 1965 Hearings, however, the FTC changed its recommendation. Chairman Dixon pointed out that the legality of the trade regulation rule would be challenged in the courts and that these proceedings might last for several years. To forestall this delay, he urged Congress to enact legislation requiring a health warning both on all cigarette packages and in all cigarette advertisements, thereby superseding the trade regulation rule.¹⁸

The FTC's recommendations were not in accord with those of the Department of Health, Education and Welfare. In 1964, the Secretary of HEW stated:

"On balance . . . it seems to us that responsibility for labeling regulation of cigarettes should be vested in this Department, preferably by way of appropriate amendment of the Federal Hazardous Substances Labeling Act, and that regulation of cigarette advertising, to the extent necessary, should be vested in

¹⁷ FTC, *Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, p. i (1964). The FTC's labeling requirement was originally to become effective on January 1, 1965, and the advertising requirement on July 1, 1965. On August 20, 1964, at the behest of the Chairman of the House Interstate and Foreign Commerce Committee, the FTC postponed the effective date of the labeling requirement to July 1, 1965. (See H.R. Rep. No. 449, 89th Cong., 1st Sess., pp. 2-3 (hereafter "House Report").) Ultimately, as a consequence of the preemptive force of the Labeling and Advertising Act, the FTC vacated its trade regulation rule. (See 30 Fed. Reg. 9484-85 (1965).)

¹⁸ 1965 Senate Hearings, p. 410; 1965 House Hearings, p. 109.

the FTC . . . to be exercised . . . under standards established in cooperation with this Department."¹⁹

At the 1965 Hearings, HEW essentially restated its previous recommendation.²⁰

Other governmental departments disagreed with both the FTC and HEW. In both 1964 and 1965 the Department of Commerce reported to Congress that "in light of [the relevant] background . . . we are not convinced of a need for the proposed legislation at this time."²¹ The Department of Agriculture also recommended against enactment of any bills to regulate cigarette advertising and labeling.²² As a result of the divergent views expressed by the various agencies,²³ the Bureau of the Budget advised the House Committee that it was "unable to support [any pending bill's] enactment at this time." (1964 House Hearings, p. 13.)²⁴

In view of the clash of opinion among the various agencies, as well as the necessarily limited jurisdiction of any single agency or department and the broad ramifications of any regulation of cigarette labeling and advertising, Congress was urged to take exclusive control

¹⁹ 1964 House Hearings, p. 18.

²⁰ 1965 Senate Hearings, pp. 22-26; 1965 House Hearings, pp. 10-14.

²¹ 1965 Senate Hearings, p. 28; see also 1964 House Hearings, pp. 19-20; 1965 House Hearings, pp. 14-17.

²² 1965 Senate Hearings, pp. 28-29.

²³ The only principle as to which there appeared to be general agreement was that state and local authorities should not be left free to adopt cigarette labeling and advertising regulations. Various witnesses commented on the chaos which would result from diverse local regulatory measures. (*E.g.*, 1965 Senate Hearings, pp. 39 (Surgeon General), 166 (American Cancer Society), 246 (tobacco industry), and 548 (FTC).) These views were underscored by the FTC's position that its trade regulation rule would not preempt local regulation of cigarette labeling and advertising. (See 1964 House Hearings, pp. 85-87.)

²⁴ 1964 House Hearings, p. 13.

over the problem. For example, Bowman Gray, Chairman of the Board of R. J. Reynolds Tobacco Company, testifying on behalf of the cigarette manufacturers, argued that "it is wholly inappropriate . . . for a decision of this scope to be made by the Federal Trade Commission, or by any other single Federal administrative agency whose jurisdiction and expertise are confined to one particular phase of this complex problem. . . . This matter should be handled by Congress and by no one else."²⁵

Significantly, the FCC also counseled against a "piecemeal" approach by an agency of limited jurisdiction. The FCC had been asked to express its views on pending bills. In a letter to the Senate Commerce Committee dated February 10, 1965, (reprinted in its entirety as Appendix B to this Brief) the Commission responded as follows:

"The Federal Communications Commission's interest in this matter is necessarily limited to the use of broadcast media for cigarette advertising. It seems clearly appropriate, however, that the matter of cigarette advertising be treated on an all-inclusive, across-the-board basis, rather than in a piecemeal fashion. Since the Federal Trade Commission has undertaken to deal comprehensively with the remedial action needed to protect the public in the light of the report on smoking and health, issued January 11, 1964, by the Advisory Committee to the Surgeon General, the Federal Communications Commission has not held proceedings, or undertaken studies, to evaluate the various factors and considerations in this area. While we believe that some action on an overall basis is appropriate, we are thus not in a position to make recommendations to the Congress in this field, and specifically, as to whether S. 547 or S. 559 should be enacted.

"The Commission recognizes the importance of this matter. In exercising its public interest responsibilities in connection with broadcasting licenses, it will, of

²⁵ 1965 Senate Hearings, p. 245.

course, cooperate in the application of whatever Federal law, policy, or regulations are adopted in this area."²⁶

Congress accepted the "across-the-board," rather than the "piecemeal," approach. As Chairman Harris of the House Committee put it, "it is a job for the Congress to do and not an executive agency or a regulatory agency through its own action"²⁷ The same view was expressed in the Report of the House Interstate and Foreign Commerce Committee:

"The determination of appropriate remedial action in this area, as recommended by the Surgeon General's Advisory Committee, is a responsibility which should be exercised by the Congress after considering all facets of the problem. The problem has broad implications in the field of public health and health research, and involves potentially far-reaching consequences for a number of sectors of our economy. . . .

"After giving consideration to various alternative approaches to the problem, the committee determined that congressional action should be taken in order to dispose of this problem promptly and effectively."²⁸

The action of the FCC in the present case thus clearly contravenes the Congressional policy to preclude any other governmental action "deal[ing] with cigarette labeling and advertising with respect to any relationship between smoking and health." (Cigarette Labeling and Advertising Act § 2.) The Commission has invaded a field in which Congress has made clear that it "intends no regulation except its own." *Rice v. Santa Fe Elevator Corp.*,

²⁶ S. Rep. No. 195, 89th Cong., 1st Sess., pp. 13-14 (hereafter "Senate Report") (emphasis supplied). The FCC expressed these same views in a letter dated November 7, 1963 to Chairman Magnuson of the Senate Commerce Committee (FCC 63-1033) and a letter dated February 5, 1964 to Congressman Farbstein of New York (FCC 64-100).

²⁷ 111 Cong. Rec. 14410 (1965).

²⁸ House Report, p. 3. (Emphasis supplied.)

331 U.S. 218, 236 (1947). Indeed, in promulgating a special rule applicable only to cigarette advertisements on radio and television, and not to those in other media, the Commission has adopted precisely the kind of "piecemeal" regulation which the FCC itself had advised Congress was "clearly [in]appropriate" and which Congress plainly sought to prevent. In these circumstances, the Commission's ruling cannot be allowed to stand. See, e.g., *Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230; *Campbell v. Hussey*, 368 U.S. 297, 300-01 (1961); *Southern Ry. Co. v. R. R. Comm'n of Indiana*, 236 U.S. 439, 448 (1915).

(ii) The FCC's Decision Is Inconsistent With the Moratorium Provision in the Statute

As we have noted, Congress provided that (except for existing FTC jurisdiction over false and deceptive advertising) there should be no further governmental regulation of cigarette advertising with respect to smoking and health until after July 1, 1969.²⁹ The Commission's ruling contradicts this Congressional direction.

a. Among the major considerations underlying the Congressional adoption of the middle-ground position—to regulate cigarette labeling but to hold the further regulation of cigarette advertising in abeyance—was the existence of divergent opinions among scientists concerning the alleged health consequences of smoking.

²⁹ The moratorium provision was itself a compromise measure. S. 559, as originally introduced in the Senate, had no provisions whatsoever regarding advertising. (See 1965 Senate Hearings, pp. 3-4.) Thus it would not have preempted the FTC's requirement of a health warning in cigarette advertising or any other advertising regulation. H.R. 3014, enacted by the House, on the other hand, would have precluded regulation of cigarette advertising with respect to health for an indefinite period. (See 111 Cong. Rec. 14421 (1965).) The House-Senate Conference, and ultimately Congress itself, adopted the temporary moratorium contained in the version of S. 559 that initially passed in the Senate. (See 111 Cong. Rec. 13932, 16541 (1965).)

On June 7, 1962, the Surgeon General announced the establishment of an Advisory Committee on Smoking and Health to review and evaluate the existing scientific literature concerning smoking and health. The Advisory Committee did not itself undertake any research.³⁰ On January 11, 1964, the Advisory Committee issued its report in which it concluded, almost entirely on the basis of statistical association, that "cigarette smoking is a health hazard" that warrants "appropriate remedial action."³¹

This conclusion was by no means unanimously accepted in the medical community. The statistical evidence was challenged on a variety of grounds. In addition, it was noted that there was no empirical proof that smoking was a cause of illness.³² The Senate Commerce Committee reported upon the conclusion of its hearings that "there remain a substantial number of individual physicians and scientists . . . who do not believe that it has been demonstrated scientifically that smoking causes lung cancer or other diseases . . ."³³ Moreover, the Advisory Committee Report itself noted that "medical perspective requires recognition of significant beneficial effects of smoking particularly in the area of mental health."³⁴ With respect to the relative importance of these beneficial effects, the Advisory Committee stated: "Since no means of quantitating these benefits is apparent the Committee finds no basis for a judgment which would weigh benefits versus hazards of smoking as it may apply to the general population."³⁵

³⁰ U.S. Dept. of Health, Education and Welfare, *Smoking and Health—Report of the Advisory Committee to the Surgeon General of the Public Health Service*, p. 8 (1964).

³¹ *Id.*, p. 33.

³² See, e.g., 1965 Senate Hearings, pp. 280-321.

³³ Senate Report, p. 3.

³⁴ Advisory Committee Report, p. 356.

³⁵ *Id.*

The conflicting views as to the underlying medical issue had a critical bearing on the ultimate legislative solution. While noting that various authorities disagreed with the findings of the Surgeon General's Advisory Committee, the Senate Committee "concur[red] in the judgment that 'appropriate remedial action' is warranted."³⁶ The House Committee, on the other hand, "was unwilling to conclude for or against the medical opinions embodied in the Advisory Committee's Report or the medical evidence elicited by its own hearings."³⁷ Both Committees agreed, however, "that the public interest requires the inclusion of a fair and factual cautionary statement on every cigarette package."³⁸

Accordingly, while Congress determined that the public should be adequately informed about the possible health hazards of smoking cigarettes, at the same time it also determined precisely what constitutes "adequate" warning—i.e., the explicit, "fair and factual cautionary statement on every cigarette package."³⁹ Congress made clear, however, that no other warning requirement, particularly with respect to cigarette advertising, could be imposed by any administrative agency.

b. Other factors underlying the moratorium provision were the existence of self-regulatory machinery within the cigarette and broadcasting industries with respect to cigarette advertising,⁴⁰ the high level of existing

³⁶ Senate Report, p. 3.

³⁷ FCC Memorandum Opinion and Order, R. 827.

³⁸ Senate Report, p. 4; House Report, p. 4.

³⁹ *Id.*; see also Cigarette Labeling and Advertising Act, § 2(1).

⁴⁰ On April 27, 1964, the manufacturers of substantially all domestically produced cigarettes announced the creation of the Cigarette Advertising Code, which became effective on January 1, 1965. The Code prescribed certain standards for cigarette advertising and provided that all advertising must be submitted to the Code Administrator, former Governor Meyner of New

public awareness of the smoking and health controversy,⁴¹ and the possible economic impact of the various regulations under consideration. With respect to the latter, extensive evidence was presented regarding the nature of the tobacco industry and its importance to farmers, growers, processors, distributors, and retail merchants as well as the fact that local, state and federal governments annually realize more than \$3.2 billion in tax revenues from the sale of cigarettes.⁴²

Particular attention was focused on the importance of cigarette advertising to the radio and television industries. For example, a spokesman for the Radio Advertising Bureau, a prominent trade association, urged that "if at this point additional legislative action is required, it should be directed to the labeling aspects of the problem. . . . Thus, the public could be fully informed and at the same time *radio would not be placed at a disadvantage in its com-*

Jersey, before it is used. (See 1964 House Hearings, pp. 140-41; Senate Report p. 5; House Report, p. 4.)

In addition, the codes of the National Association of Broadcasters were amended in 1964 to provide new restrictions on cigarette advertising. In January, the following provision was added to the Television Code:

"The advertising of cigarettes should not be presented in a manner to convey the impression that cigarette smoking promotes health or is important to personal development of the youth of our country." (1965 Senate Hearings, p. 591.)

In June, a similar provision was added to the Radio Code of Good Practice. (*Id.*)

⁴¹ Commenting on the success of governmental and private informational activities on January 11, 1965, one year after the Advisory Committee Report, Surgeon General Terry said, "I doubt that any health message has ever reached as many in so short a time." (Address before the Conference of the National Interagency Council on Smoking and Health, Washington, D.C.) See also 1964 House Hearings, p. 15; 1965 Senate Hearings, p. 103; 1965 House Hearings, pp. 232-33, 244; Senate Report, p. 3; House Report, p. 3; 111 Cong. Rec. 13897 (1965).

⁴² See, e.g., 1964 House Hearings, pp. 28, 30, 139, 290, 310, 325-27; 1965 Senate Hearings, pp. 245-46, 260, 397, 406, 543, 550, 941-43, 991; 1965 House Hearings, pp. 2, 34; 111 Cong. Rec. 13914-15 (1965).

petition with the printed media for proper advertising revenues."⁴³ The Television Bureau of Advertising, Inc., also opposed regulation of cigarette advertising. Among other things, its spokesman stated that "*the concept of 'equal time,' appropriate in politics, is out of place in product advertising—particularly where, as here, the case against the product has been so publicized in recent years that there is probably not a user in the country who is not aware of it*"⁴⁴

The significance of these economic factors was underscored in the Report of the House Committee, as follows:

"The entire tobacco raising and manufacturing industry, and the numerous businesses which market tobacco products are involved. Some proposals have been made in this area which might lead to severe curtailing or the possible elimination of cigarette advertising. This could have a serious economic impact on the television, radio, and publishing industries in the United States."⁴⁵

c. All the factors discussed above played a role in the Congressional decision to hold the regulation of cigarette advertising in abeyance.⁴⁶ Application of the "Fairness Doctrine" to cigarette advertising disrupts the accommodation of these factors so carefully worked out by Congress.

The underlying premise of the FCC's ruling in this case is that it is necessary, in order to apprise the public that "smoking may be a hazard to the smoker's health," to

⁴³ 1964 House Hearings p. 319; 1965 Senate Hearings, p. 960. (Emphasis supplied.)

⁴⁴ 1964 House Hearings, p. 330 (emphasis supplied). For other testimony expressly urging Congress not to adopt any regulations with respect to cigarette advertising, see, e.g., 1964 House Hearings, pp. 317-18, 320-22; 1965 Senate Hearings, pp. 553-57, 918-20, 923-25, 929, 939-40, 944-46, 949-53, 988-90; 1965 House Hearings, pp. 358-62, 375-77, 388-89, 694.

⁴⁵ House Report, p. 3.

⁴⁶ See Senate Report, p. 5; House Report, pp. 3-5.

counterbalance cigarette advertisements on radio and television with antismoking messages. But Congress clearly rejected this premise when it refused to adopt one of the polar positions urged upon it in 1964 and 1965 and chose instead the middle-ground position embodied in the statute. Indeed, Congress expressly determined that the prescribed cautionary statement on all cigarette packages would constitute "adequate warning" of any health hazard that might be connected with cigarette smoking.⁴⁷ Moreover, Congress clearly concluded "that *any* restriction in the matter of advertising in magazines and on television and elsewhere should be held in abeyance,"⁴⁸ and that this preemption provision applies to "all Federal, State, and local authorities."⁴⁹ Finally, Congress unequivocally declared that it was its policy to protect commerce to the "maximum extent" consistent with the prescribed labeling requirement in recognition, among other things, of the potentially "serious economic impact [of advertising regulations] on the television, radio, and publishing industries in the United States."⁵⁰

To be sure, no explicit mention was made during the legislative proceedings of the possibility that the FCC would attempt to extend the "Fairness Doctrine" to cigarette advertising.⁵¹ There was no occasion to mention it.

⁴⁷ Senate Report, p. 1; House Report, p. 1; see also § 2(1) of the Act.

⁴⁸ Remarks of Senator Cotton, 111 Cong. Rec. 13899 (1965). (Emphasis supplied.) See also remarks of Rep. Udall, 111 Cong. Rec. 16546 (1965) (the Act prevents any agency of government from "doing anything about cigarette advertising for the next 3 years"); remarks of Rep. Bolling, 111 Cong. Rec. 16545 (1965) (the Act "preempts the right of any entity, of any government, to decide for itself, 'What about cigarettes?'"); remarks of Rep. Moss, 111 Cong. Rec. 16543 (1965) ("But we are not going to alert you by any other means [except the cautionary label]. We are going to strip every other agency . . . of the right to do that . . .").

⁴⁹ Senate Report, p. 6; House Report, p. 5.

⁵⁰ § 2(2) of the Act; House Report, p. 3.

⁵¹ But see Statement of Television Bureau of Advertising, *supra*, p. 30.

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The unmistakable implication of the FCC's replies to the Congressional inquiries regarding legislation concerning cigarette advertising was that the agency did not consider it appropriate for it to undertake "piecemeal" regulation of any sort in the smoking and health area.

B. The FCC's Reasoning With Respect to the Labeling Act Will Not Withstand Scrutiny

1. The Commission concedes in its opinion that the Advertising and Labeling Act constitutes a limitation on the FCC's authority over radio and TV licensees. Thus, the Commission acknowledges that it could not, consistently with the Act, "require either a cessation of cigarette advertising or the inclusion of a health warning in [or adjacent to] the advertisement itself."⁵² Further the Commission agrees that it would be inconsistent with the Act to require that time be afforded to antismoking advocates "roughly approximate" to that devoted to cigarette commercials. As the Commission stated: "The practical result of any roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising. But in the 1965 Act, Congress made it clear that it did not favor 'such a 'drastic' step'"⁵³ The Commission reasons, however, that application of the "Fairness Doctrine" to cigarette product advertising is not precluded since there is no "express indication" to that effect in the statute.⁵⁴

The short answer to the Commission's conclusion is that there is no "express indication" in the Act that cigarette advertising should not be prohibited altogether, that anti-smoking messages should not be required to be carried adjacent to cigarette commercials, or that anti-smoking pro-

⁵² Memorandum Opinion and Order, R. 824, 825.

⁵³ Letter Ruling, R. 16.

⁵⁴ Memorandum Opinion and Order, R. 829.

ponents should not be accorded time "roughly approximate" to that devoted to cigarette commercials. Yet the FCC itself concedes that each of these types of regulation would conflict with the Act. The point is that the restriction on FCC power to apply the "Fairness Doctrine" to cigarette product advertising derives not from the literal language of Section 5(b), but from the purpose of the Act, as reflected by the legislative history and the recitations in the Preamble.

The statute reaffirms the power of the FTC "with respect to unfair or deceptive acts or practices in the advertising of cigarettes" (Section 5(c).) But there is no parallel reaffirmation of the FCC's authority. If the statute is to be construed literally—as the FCC apparently believes it should be—the omission of this counterpart provision is fatal to the Commission's position.

The requirement that licensees provide "a significant amount of time" to smoking critics likewise cannot be squared with the Act. It could also have the effect of "substantial curtailment" of cigarette advertising which, the Commission concedes, would be contrary to the Congressional intent. The difference between "significant" time and "roughly approximate" time is one of degree only. Surely, Congress did not intend to draw the line between permissible and impermissible regulation on the basis of such an elusive distinction.

Prior to the present case, the FCC itself had apparently acknowledged the preemptive force of the Act. Thus, on March 29, 1966, only eight months after passage of the Cigarette Labeling and Advertising Act, the then Chairman of the FCC delivered an address to the National Association of Broadcasters in which he acknowledged that the Act precluded governmental "advertising regulations as to cigarette smoking." Speaking in terms strongly suggestive of the "Fairness Doctrine" the Chair-

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man observed "that a major public controversy is in progress as to the harmful effects of cigarette smoking on the American public" and argued that "broadcasting has unique responsibilities" in this regard. With respect to any action by his or any other governmental agency, however, the Chairman stated:

*"The 1965 Labelling Act forbids any other federal advertising requirements as to cigarette smoking for a period of four years. But it does not forbid broadcasters from adopting and strictly applying appropriate standards to reflect increasingly persuasive medical evidence, or the hazard labelling requirements of the law itself."*⁵⁵

While the FCC may have the right, which it asserted in the present case, to change its "view of what is best in the public interest,"⁵⁶ it is not privileged to alter the meaning of a controlling Congressional enactment on the basis of such a change of heart.

2. The Commission also attempts to reconcile its ruling with the statute on the ground "that our ruling implements the smoking education campaigns referred to as a basis for Congressional action in the Labeling Act."⁵⁷ But the complete statement in the Senate Report relied on by the Commission referred to "the extensive smoking education campaigns *now underway*."⁵⁸ The only smoking education campaigns contemplated by Congress in 1965 were those financed by governmental appropriations and the voluntary contributions of private anti-smoking interests. The present ruling, however, looks to a completely different, and widely

⁵⁵ Address by Chairman E. William Henry before the National Association of Broadcasters, Chicago, March 29, 1966, p. 6 (emphasis supplied in first sentence).

⁵⁶ Memorandum Opinion and Order, R. 823, n. 8.

⁵⁷ *Id.*, R. 830.

⁵⁸ Senate Report, p. 5. (Emphasis supplied.)

expanded, "educational" campaign—involuntarily subsidized in large measure by broadcast licensees and, indirectly, by advertisers.

That Congress had no such program in mind was made clear in a colloquy between Senator Magnuson, Chairman of the Senate Commerce Committee and principal sponsor of the Act, and Surgeon General Terry, who was in charge of the government's "smoking education campaigns":

"THE CHAIRMAN. Now, do you, under your program . . . intend to use advertising, that is public service advertising, to convey what you think your conclusions are?

* * * *

". . . radio and television stations have a certain amount of public service time. Do you utilize that at all or would you plan to?

"DR. TERRY. I do not believe that we have utilized this and I know of no specific plans to do this.

"THE CHAIRMAN. Of course it will be up to the individual licensees to take it or not take it." (1965 Senate Hearings, p. 40.)

In any event, the "smoking education campaigns" cited by Congress were expressly referred to as a reason to *refrain* from regulating cigarette advertising. It is disingenuous to take the mention of these campaigns in the legislative history out of context and rely on it as a reason to *impose* such regulation.

It is evident that, in adopting its ruling in the present case, the Commission has misconceived the Congressional purpose.

II. THE "FAIRNESS DOCTRINE" SHOULD NOT BE HELD APPLICABLE TO COMMERCIAL PRODUCT ADVERTISING⁵⁹

A. The Present Decision Is Inconsistent With the History and Purposes of the "Fairness Doctrine"

The history and purposes of the "Fairness Doctrine" provide no warrant for the FCC's extension of the doctrine to advertising directed solely toward the selling of a commercial product.⁶⁰ The "message" involved in such advertising—i.e., the urging of the public to buy a particular product, in this case, one or another brand of cigarettes—is not the kind of communication of ideas which should trigger the operation of the "Fairness Doctrine" if the doctrine is rationally construed and applied.

The FCC's first comprehensive formulation of the doctrine, in its 1949 *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 25 R.R. 1901, makes plain that the genesis and guiding principle of the "Fairness Doctrine" is to encourage full discussion and rational consideration of important public issues with a view to creating an

⁵⁹ To avoid burdening this Court with repetitious argument, we have not addressed ourselves specifically in this Brief to the constitutionality of the "Fairness Doctrine." This issue is presently pending before the Supreme Court. (*Red Lion Broadcasting Co. v. FCC*, cert. granted 389 U.S. 968 (1967).) The Brief of the National Association of Broadcasters in the present case fully presents the contention that the doctrine as applied here unconstitutionally abridges First and Fifth Amendment rights. We join in that argument. We need only add that petitioners' First and Fifth Amendment rights as well as those of licensees are at stake here. As pointed out in the NAB Brief, the "Fairness Doctrine" as applied in this case leads to censorship by broadcasters: avoidance of any material that might possibly trigger the "Fairness Doctrine." Such censorship would deny petitioners access to the airwaves and thus constitute a serious obstacle to the exercise of their rights of free speech. It would also significantly interfere with their ability to sell their product—an entirely lawful one—and thus infringe their property rights without due process of law.

⁶⁰ The genesis of the doctrine is set forth at length in Judge Tamm's opinion in *Red Lion Broadcasting Co. v. FCC*, *supra*, 381 F. 2d at 917-20.

informed public opinion on the issues of the day.⁶¹ Throughout the 1949 *Report* the FCC emphasized balance and fairness in "the presentation of *news* and programs devoted to the consideration and *discussion* of public issues," *i.e.*, "*news, commentary and opinion*," as the means by which this objective might be achieved. 13 F.C.C. at 1246, 1249; 25 R.R. at 1902, 1905 (emphasis supplied). Nowhere in this groundbreaking *Report* is there any indication that the FCC regarded the doctrine it was formulating as applicable to routine commercial advertising solely designed to sell a product.

The 1959 amendment to Section 315 of the Communications Act (79 Stat. 557, 47 U.S.C. § 315) cannot be interpreted as sanctioning the FCC's present application of the "Fairness Doctrine" to commercial advertising. All that Congress did in 1959 was to relieve broadcasters from the "equal opportunities" provisions of the existing law with respect to the appearance of candidates for public office on news-type programs. In doing so, Congress provided that:

"Nothing in the foregoing sentence [relieving broadcasters from this obligation] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

There is not a word in this provision or in the legislative history behind it to justify application of the "Fairness Doctrine" to commercial advertising. Just as the FCC

⁶¹ "The development of an informed public opinion through the public dissemination of *news and ideas* concerning the vital public issues of the day is the keystone of the Fairness Doctrine." In the Matter of Amendment of Part 73 of the Rules, FCC Docket No. 16574, 10 R.R. 2d 1901, 1905 (emphasis supplied).

had done in its 1949 *Report*, the statute relates "fairness" to programming which constitutes "discussion" of views on public issues. Insofar as it refers specifically to any type of programming to which the "Fairness Doctrine" is applicable, the Act refers only to programs of the "news, commentary and opinion" type with which the FCC was exclusively concerned in its 1949 *Report*.⁶² At no time before enactment of this legislation was Congress apprised that the FCC contemplated making the "Fairness Doctrine" applicable to product advertising. There had been no application of the doctrine to commercial advertising by the FCC between the 1949 *Report* and the 1959 amendment.

The FCC's so-called "Fairness Primer," issued in 1964, is further indication that the FCC itself did not believe the "Fairness Doctrine" to apply to routine product advertising, either before or after the 1959 legislation. This "Primer," which was intended to advise licensees and the public of the "rights, obligations, and responsibilities" of licensees under the "Fairness Doctrine," reaffirmed the integral relation of the doctrine to programming which involves the deliberative consideration of public issues. Its very first sentence stated that the doctrine "is applicable in any case in which broadcast facilities are used for the *discussion* of a controversial issue of public importance." 29 Fed. Reg. at 10416, 2 R.R. 2d at 1902 (emphasis supplied).

The "Primer" stated that the 1949 *Report* was still the Commission's "basic policy in this field and remains the keystone of the Commission's fairness policy today." 29

⁶² The Senate Committee reported that, in removing the "equal opportunities" obligation of licensees with respect to the appearance of candidates on news-type programs, the bill which became the amendment to Section 315 was intended to put these programs in the same category "as all other news, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussion programs." S. Rep. No. 562, 86th Cong., 1st Sess., p. 14.

Fed. Reg. at 10416, 10426, 2 R.R. 2d at 1902, 1923. It set forth a digest of 28 prior interpretative rulings on the "Fairness Doctrine" by the FCC. Not one involved product advertising. There was no suggestion anywhere else in the "Primer" that the doctrine applies to such advertising.

Thus, from the time it issued its basic *Report* in 1949 until the decision in the present case the FCC had never even intimated that the "Fairness Doctrine" is applicable to commercial advertising. The FCC's silence was total. If silence can ever constitute a settled course of administrative interpretation on which persons may safely rely, the inapplicability of the "Fairness Doctrine" to the day-in, day-out outpouring of product advertising on radio and television for nearly two decades would seem to be such an instance.⁶³

The reasons why the "Fairness Doctrine" was not deemed applicable to commercial advertising prior to this case—and why it should not now be held applicable to routine product advertising—are not hard to find.

As we have shown, the genesis and purpose of the doctrine was the FCC's concern with advancing public understanding of controversial issues by assuring full and balanced presentation and discussion of these issues. It is an exercise in unreality to regard the ordinary commercial advertisement—urging the audience to buy this or that product—as containing a presentation and discussion of a viewpoint with respect to a public controversy which may be engendered over the health or safety of the product itself. Such advertisements are designed to sell products

⁶³ As far as we can determine, the FCC's only even tentative gesture in this direction was a 1946 *dictum* that liquor advertising could raise a controversial issue in a listening area, 40% of which was legally dry. *In re Petition of Sam Morris*, 11 F.C.C. 197, 3 R.R. 154. This case was not cited or the *dictum* repeated in the 1949 *Report* or in the 1964 "Primer." It was exhumed by the FCC for the present case. (R. 821.)

in the simplest and most effective way, capitalizing on such factors as novelty and originality. They are not dissertations directed to the deliberative process or designed to deal with issues which the use of particular products may present.⁶⁴

The FCC's decision in this case simply leads to a battle of the "spots"—with many licensees presumably "balancing" cigarette commercials on the other side with spot announcements urging that smoking poses hazards to health. This is the antithesis of the balanced and rational presentation of opposing points of view which the "Fairness Doctrine" was intended to achieve. Certainly public understanding of the complex questions involved in the relationship of smoking and health will not be advanced by such a process.

B. Cigarette Advertising Cannot Properly be Singled Out for Application of the "Fairness Doctrine"

Moreover, there is no rational basis for treatment of cigarettes as unique in applying the "Fairness Doctrine" to commercial advertising, as the FCC apparently proposes to do. Once the "Fairness Doctrine" is made applicable to product advertising, it cannot be limited to a single product without sacrificing whatever lingering rationality and "fairness" it may still retain.

There are controversies in our society over the possible hazards of many products. The automobile is the most obvious example of a product which has been the center of a major safety controversy in recent years. But so have many other products, such as: products containing cholesterol, products containing fluorides, beer, wine, vitamins,

⁶⁴ For example, of the three advertisements cited by petitioner Banzhaf in his first letter to WCBS-TV, two merely depict Western scenes and invite the viewer to "Come to Marlboro Country," and the third contains a party scene set to a jingle lauding the length, packaging and flavor of "Pall Mall Gold." (R. 416-20.)

proprietary drug products for colds, headaches and insomnia, insecticides, and air travel. Other businesses, such as mutual funds and finance companies, have also been the subject of controversy.⁶⁵

The FCC seeks to dismiss this contention merely as a "parade of horrors" (R. 846). But there is nothing imaginary about the parade, at least not if the FCC has any intention of adhering to the logic of prior decisions or is obligated to rest its rulings on reason and not fiat.⁶⁶

If advertisements for all products about which there may be a controversial issue of public importance constitute a viewpoint on that issue, invoking the "Fairness Doctrine," the airwaves will be afflicted with a vast amount of repetitive contention on a multitude of subjects. Not one, but many battles of the "spots" will have to be fought out on the air. This surely would not be in the "public interest" which licensees are mandated to serve, nor would such saturation of the airways further public understanding of the genuinely important issues of the day.

The grounds relied on by the FCC to differentiate cigarettes from other product controversies are insubstantial. The existence of "governmental and private reports and Congressional action" is not unique to cigarettes. Many products and business activities have been the subject of

⁶⁵ In a letter to Station KTLN in Denver, Colorado, on July 22, 1965, (FCC 65-681) the FCC stated that it appeared that the debt-adjusting and credit-counseling business presented a controversial issue of public importance in Colorado, and that a series of broadcasts discussing this type of business activity invoked the operation of the "Fairness Doctrine." So would mere spot commercials for this business, if the present FCC decision is sound.

⁶⁶ Even commentators who have attempted to support the FCC decision in the present case recognize that it cannot rationally be applied to cigarettes alone. "The cigarette decision does not inevitably lead to the right to respond to any commercial; but it presumably means that when the criteria laid down are satisfied by some other product, the Doctrine must be applied." Note, *Fairness, Freedom and Cigarette Advertising: A Defense of the Federal Communications Commission*, 67 Colum. L. Rev. 1470, 1483 n. 107 (1967).

reports and legislative action dealing with their relationship to health or safety. Automobiles again are the most prominent recent example. The controversy over automobile safety has generated a voluminous literature and produced the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C. §§ 1381 *et seq.* Reports have been issued and legislation enacted with respect to many other products in recent years.⁶⁷

The FCC's other ground for distinguishing cigarettes—that the reports on cigarettes assert that “normal use of this product can be a hazard to the health of millions of persons” (R. 846)—is equally defective. It was precisely the *normal* use of automobiles which was alleged to constitute the threat to public safety—the leading item of controversial literature charged that American automobiles were “Unsafe At Any Speed.”⁶⁸

The same is true of many other products and business activities about which there have been significant public controversies—it is the normal use of products containing cholesterol, the normal use of alcoholic beverages, the normal use of products containing fluorides, the normal use of airplanes, which is held to constitute a danger to health or safety by many persons involved in the controversies over such products.

It was therefore an arbitrary act for the FCC to single out cigarettes for unique treatment. Why should the “Fair-

⁶⁷ *E.g.*, Federal Food, Drug and Cosmetic Act, 52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301 *et seq.*; Federal Hazardous Substances Labelling Act, 74 Stat. 372 (1960), as amended, 15 U.S.C. §§ 1261 *et seq.*; U.S. Dept. of HEW, *Alcohol and Accidental Injury* (1966); U.S. Dept. of HEW, *Diet, Cholesterol and Arteriosclerosis*, Heart Research News (Summer 1965); Public Health Service, 1966 National Dental Health Assembly (with emphasis on fluoridation) (PHS Publication No. 1552, 1966).

⁶⁸ Nader, *Unsafe At Any Speed* (1965). Similarly, as Commissioner Loevinger pointed out in his concurring opinion (R. 863), the normal use of automobiles is one of the primary causes of air pollution, which poses a threat not merely to the safety of users of automobiles and pedestrians but to the health of the entire population in some localities.

ness Doctrine" be applied to the commercial advertising of this product and not to any other? The answer must be that the FCC has in effect taken one side of the controversy over cigarettes and health, that it has concluded that cigarette smoking is hazardous to health—although this is what the controversy is all about—and that it has decided that it must take action against cigarette advertising in order to achieve what it has concluded to be in the public interest.

Nothing was more firmly settled—at least prior to the present case—than the principle that in applying the "Fairness Doctrine" the FCC has no authority to take sides in the controversy; its role is limited to determining whether a controversy exists. As Judge Tamm wrote, in this Court's decision in the *Red Lion* case:

"any attempt by the Commission to make factual determinations of truth or falsity in controversial issues of public interest would constitute an illegal exercise of a nonexistent authority." *Red Lion Broadcasting Co. v. FCC*, *supra*, 381 F.2d at 924.

This was also the FCC's view from the time of the promulgation of the "Fairness Doctrine" until the present case. Thus, the FCC said in its 1949 *Report*:

"It does not require any appraisal of the merits of the particular issue to determine whether reasonable efforts have been made to present both sides of the question" 13 F.C.C. at 1255-56, 25 R.R. at 1911.

The FCC reiterated this proposition in its "Primer," stating that application of the "Fairness Doctrine" "does not require the Commission to consider the merits of the viewpoint presented." 29 Fed. Reg. at 10427, 2 R.R. 2d at 1925.

But it is plain, despite its claim of neutrality, that the FCC has abandoned neutrality in singling out cigarette advertising for special treatment under the "Fairness Doc-

trine." Although it repeatedly stated in its opinion that the controversy to be aired is whether cigarette smoking is a hazard to health, the FCC is evidently convinced that it is. Otherwise it is difficult to understand why the FCC should support its decision by the statement that: "of most concern to the Commission are statistics as to the correlative rise in cigarette consumption and teenage smoking" (R. 854); or why it should deny a stay of the effectiveness of its ruling on the ground that "if our ruling will contribute to the avoidance of one untimely death, the public interest would not be served by any delay in its effectiveness" (R. 853); or why it should justify its authority to act in this case, in the face of the preemptive character of the Cigarette Labeling Act, on the ground that it is thereby carrying out a purported Congressional policy to "educate the public as to the hazards of smoking." (R. 835.) It is manifest in the opinion that the FCC has decided to use the "Fairness Doctrine" as a weapon to counteract cigarette advertising because it has resolved the controversy to its own satisfaction in favor of the anti-smoking point of view.⁶⁹

Indeed, the FCC virtually admitted its wish to ban cigarette advertising altogether, stating: "Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest." (R. 855.) Recognizing that the Cigarette Labeling Act is an absolute bar to its doing so, it instead proceeded, from the same premise about what the public interest requires, to single out cigarette advertising for application of the "Fairness Doctrine."

As Commissioner Loevinger pointed out, however, "the Commission has not been given a roving mandate by Congress to do whatever it may regard as socially desirable

⁶⁹ Commissioner Loevinger candidly acknowledged in his concurring opinion that this was the reason he voted to apply the "Fairness Doctrine" in this case. (R. 865.)

(i.e., 'in the public interest'). On the contrary, it has been established by Congress with a limited jurisdiction and can act only within the power delegated to it by Congress, which means that it cannot act without some definite basis." (R. 862.)

As the Supreme Court has said of a previous effort by the FCC to read its own views of social policy about particular types of programs into law:

"Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of [a governing statute] does not provide the remedy." *FCC v. American Broadcasting Co.*, 347 U.S. 284, 297 (1954).

III. EVEN IF THE "FAIRNESS DOCTRINE" WERE APPLICABLE TO ROUTINE PRODUCT ADVERTISING, ITS APPLICATION BY THE FCC IN THE PRESENT CASE CANNOT BE UPHOLD AS A VALID EXERCISE OF COMMISSION AUTHORITY.

Even if some advertisements for some products in some circumstances might be deemed to constitute expression of one side of a controversial issue of public importance and thus trigger operation of the "Fairness Doctrine," there is no basis for the conclusion that all advertisements for a particular product which is a subject of controversy do so, without regard to what they actually say. Yet that is what the FCC has concluded in this case.

The FCC has chosen to regard all such advertisements as expressing one side of the controversy over the possible relationship of smoking and health—without regard to the text of the particular advertisements which formed the basis of the original complaint and without firsthand consideration and analysis of what current cigarette advertisements actually say and depict. On the basis of this *a priori* conclusion as to the character of cigarette advertising—unenlightened by exposure to the facts of particular

advertisements—the FCC has further fastened on licensees which carry any cigarette advertising an automatic obligation to counteract such advertising by regular presentations of the position that smoking is hazardous to health.

As we discuss below, such a *per se* application of the “Fairness Doctrine” is inconsistent with the history of the doctrine and its prior application by the FCC; contradicts reason and experience; is not justified by any factual findings made by the Commission; was arrived at in disregard of the elements of procedural regularity and rational decision-making in the administrative process; and betrays lack of understanding of the framework of governmental and industry regulation which already controls the permissible content of cigarette advertising.

A. Per Se Rules Like That in the Present Case Are Not Valid Applications of the “Fairness Doctrine”

In describing the operation of the “Fairness Doctrine,” the FCC had always taken the view—at least prior to this case—that its application in a particular situation must be decided in the context of the specific facts of that situation. Thus, in its 1964 “Primer,” the Commission stated:

“In an area such as the fairness doctrine, the Commission’s rulings are necessarily based upon the facts of the particular case presented, and thus a variation in facts might call for a different or revised ruling.” 29 Fed. Reg. at 10416, 2 R.R. 2d at 1904. (Emphasis supplied.)

Similarly, the FCC stated:

“The fairness doctrine is applicable to specific controversial issues of public importance; when, because of complaints, the Commission undertakes an investigation as to whether there has been compliance with the fairness doctrine, that investigation is necessarily in terms of specific controversial issues, and not generalities.” Letter to Capitol Broadcasting Company of Raleigh, North Carolina, July 29, 1964, 2 R.R. 2d at 1107. (Emphasis supplied.)

Pursuant to this approach, the FCC has required that, in order to trigger the operation of the "Fairness Doctrine," there must be explicit presentation of a point of view on a controversial issue of public importance.

This question arose in *In re Complaint of Madalyn Murray*, 5 R.R. 2d 263 (1965), when a professed "free thinker" complained that the broadcasting of church services, devotionals, and prayer constituted presentation of one side of the issue of "free thought" versus religion and invoked the "Fairness Doctrine." The licensees took the position that the mere broadcasting of such programs did not in and of itself constitute presentation of a point of view on this issue. The FCC upheld the licensees' exercise of discretion in refusing to accord time to the complainant.

Chairman Henry, in a concurring opinion, specifically disposed of the proposition that a whole class of programming may be treated as the presentation of a viewpoint on a controversial issue and trigger the "Fairness Doctrine," without regard to what is actually said on particular programs. He said:

"The doctrine thus deals with specific controversial issues covered by licensees, and not with programs, programming categories, or other 'generalities'

"... The crucial question, . . . is whether these broadcasts contained a viewpoint on a controversial issue of public importance, within the meaning of the doctrine.

"There is no showing that this was the case. The matter comes before us simply in the context of the presentation of 'church services, devotionals, prayers.' The Commission has long held that mere carrying of a religious broadcast does not, in and of itself, mean that one side of a 'controversial issue of public importance' was presented. [Citation omitted.] The contrary position urged in effect by complainant—that every devotional service, per se, is presentation by the licensee of a viewpoint on a controversial issue—is, I

think, patently unreasonable." 5 R.R. 2d at 266-67 (emphasis supplied).⁷⁰

The import of this course of decision by the FCC is clear. *Per se* rules have no place in the proper application of the "Fairness Doctrine." Unless there is explicit expression of a point of view on a particular controversial issue, the doctrine does not become operative.

Tested by these standards, the broadcasting of cigarette commercials in and of itself should not trigger the operation of the "Fairness Doctrine." The FCC in its opinion repeatedly framed the controversial issue ostensibly raised by cigarette advertising as the question whether smoking constitutes a hazard to health. (See pp. 4, 5-6, *supra*.)⁷¹ Therefore, unless a particular cigarette advertisement expresses a point of view on that issue, it cannot be said to present an issue invoking the "Fairness Doctrine."

⁷⁰ Likewise, the FCC found no basis for action under the "Fairness Doctrine" on a complaint that the mere appearance of Chairman Henry on NBC's "Meet the Press" invoked the doctrine. The complainant urged that it hold the doctrine applicable on the ground that the FCC itself is a controversial agency which imposes unreasonable demands on broadcasters, exercises censorship of programs, intimidates the broadcasting industry, and should be investigated by Congress. The licensee pointed out that none of these matters was actually discussed by Chairman Henry in his appearance, and there was therefore no occasion for operation of the "Fairness Doctrine." Letter to Dr. Carl McIntire, February 5, 1964 (FCC 64-83).

A similar result was reached with respect to a complaint that Abba Eban's appearance on a television program was a presentation of a point of view with respect to the Arab-Israeli conflict, a controversial issue of public importance. The licensee pointed out that Eban did not address himself to this conflict during his appearance but talked about the development of the State of Israel. Letter to Dr. M. T. Mehdi, October 21, 1965 (FCC 65-955).

⁷¹ The FCC recently reiterated this statement of the controversial issue purportedly raised by cigarette advertising:

"The Commission has recognized that there is a controversial issue of public importance involved here—the possible effect of cigarette smoking on health." Letter to Larry Jonas, Station KBMC-FM, November 2, 1967 (FCC Log No. C9-1304). (Emphasis supplied.)

If a cigarette commercial were to set out the views of the many distinguished scientists who maintain that there has been no scientific proof that smoking is a cause of disease,⁷² a different question under the "Fairness Doctrine" would, of course, be presented. But there is no showing in this case that cigarette commercials make any such presentation of this point of view, or indeed that they say anything at all on the relationship of cigarettes and health. Certainly, the three advertisements which were placed into the record after the FCC's initial ruling of June 2, 1967, by one of the petitioners for reconsideration—and which the FCC did not even consider relevant to its final decision—express no point of view on this issue. (See note 64, *supra*.)

B. The Present Decision Was Reached in Disregard of Procedural Requirements and Basic Standards of Fairness

The contrast between the decision-making process in this case and that employed by the FCC in other cases is striking. Thus, the 1949 *Report* "was the result of a two-year proceeding in which members of the public, the broadcasting industry, and the Commission participated. "Fairness Primer," 29 Fed. Reg. at 10426, 2 R.R. 2d at 1923. When the FCC decided to systematize the principles governing so-called "personal attacks" under the "Fairness Doctrine," it held a formal rule-making proceeding for that purpose, which lasted more than a year and afforded opportunity for full presentation of all points of view and elaborate exploration of the difficult issues involved.⁷³ In this case, however, the FCC declined to invoke the rule-making procedure, solicited no views of interested par-

⁷² See p. 27, *supra*.

⁷³ Notice of Proposed Rule Making, 31 Fed. Reg. 5710; In the Matter of Amendment of Part 73 of the Rules, FCC Dkt. No. 16574, Opinion and Order adopted July 5, 1967; clarified and revised August 2, 1967. 10 R.R. 2d 1901 (1967). The validity of the FCC's "personal attack" rules is presently at issue in *Radio Television News Directors Ass'n v. FCC*, Nos. 16369, 16498, 16499 (7th Cir.).

ties, and held no hearings at all on the equally complex issues presented here.

In the case of other complaints under the "Fairness Doctrine," the FCC has insisted on having detailed presentation of all the relevant facts. See "Fairness Primer," 29 F.R. at 10416, 2 R.R. 2d at 1904-1905. Thus, the FCC—in an opinion rendered since the decision in the present case—declined to rule on a complaint by the New York Civil Liberties Union that there was imbalance in licensee coverage in the New York area of the proposed New York State Constitution. The FCC stated:

"You have not submitted any complaint setting forth the *complete factual situation* with respect to any licensee. . . . The critical consideration is whether a particular licensee has afforded reasonable opportunity for the discussion of this controversial issue of public importance, and that in turn, *depends on the facts of each case*, and could vary from licensee to licensee. . . . Since the essential facts here have not been stated, we do not reach other possible issues." Telegram to New York Civil Liberties Union, October 31, 1967, 11 R.R. 2d 634-35.⁷⁴ (Emphasis supplied.)

Moreover, the FCC followed the extraordinary procedural course in the present case of not even giving WCBS-

⁷⁴ The FCC purported to distinguish the ruling in the present case on the ground that "the pleadings in that instance [the cigarette case] established the essential facts which called for the ruling there made." (*Id.*) This distinction is utterly mysterious. WCBS-TV was not given notice of the complaint and an opportunity to reply prior to the original ruling of June 2, 1967; its letter to Banzhaf of December 30, 1966 did not address itself to the character of cigarette advertising, since it took the view that the "Fairness Doctrine" did not apply to commercial advertising and that in any event it had given balanced coverage of the issue of the possible relation of smoking to health. The pleadings filed by the parties seeking reconsideration denied that cigarette advertising expresses a point of view on the issue of smoking and health. Thus, the pleadings in the present case establish that there is a conflict as to the essential facts underlying the cigarette ruling, a conflict which the FCC disabled itself from resolving since it ruled that the text of the particular advertisements was not relevant.

TV notice of the complaint and an opportunity to reply, contrary to the Commission's stated policy and practice in other cases⁷⁵ and its procedural obligation under Section 4 of the Administrative Procedure Act.⁷⁶ It was only *after* the FCC had decided the applicability of the "Fairness Doctrine" to cigarette product advertising that it received written submissions on behalf of the party complained against, and from other interested parties, but it still accorded no oral hearing to any of them and declined to hold a formal rule-making proceeding.

The Commission then reaffirmed what it had already decided. But once having committed itself, it could scarcely be expected to apply an independent judgment to the validity of its own prior action. Its only concession—in itself an implied recognition of the procedural irregularity and unfairness of what had gone before—was to state that its new construction of the "Fairness Doctrine" would be applied to licensees only prospectively.

Such a belated concession hardly repairs the damage to the interests of affected parties and to the soundness of the decision-making process caused by the FCC's having reached a decision on so far-reaching a matter without

⁷⁵ "If the Commission determines that the complaint sets forth sufficient facts to warrant further consideration, it will promptly advise the licensee of the complaint and request the licensee's comments on the matter." "Fairness Primer," 29 Fed. Reg. at 10416, 2 R.R. 2d at 1905.

⁷⁶ Section 4(b) provides that:

"After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule-making through submission of written data, views or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose." 60 Stat. 238 (1946), 5 U.S.C. § 1003(b).

hearing from anyone but the complainant in the first place.⁷⁷ It is ironic that an agency enforcing a so-called standard of "fairness" should be so demonstrably unfair in its own decision-making process.

C. The Present Decision Lacks Factual Support in the Record

As might be anticipated from a course of decision-making unilluminated by a fully developed factual record and subject to such procedural vagaries, the FCC's opinion is devoid of factual support for its sweeping conclusions about cigarette advertising. The process of reasoned reflection upon proved facts in order to determine appropriate principles of law—which our legal system has always demanded from its courts and has a right to expect from its administrative agencies, especially when they enter a new domain of law-making—is nowhere visible in the FCC's decision.

As factual justification for its extraordinary conclusion that all cigarette advertising *per se* expresses one side of the issue of the relation of smoking to health, the FCC relied, not on first-hand knowledge or information gathered through its own fact-finding processes, but on a report to Congress by the Federal Trade Commission published on

⁷⁷ Even proponents of the ruling are deeply troubled by the manner of the decision:

"One prerequisite to assurance that the Fairness Doctrine will not become an instrument of misrule is procedural fairness in its application. *The cigarette decision is not a shining example of such fairness.* CBS-TV received no formal notice of the complaint on which the decision was based until it got a letter announcing the decision. The use of an informal letter to a licensee as the vehicle for a major policy announcement is itself rather troubling. *The Commission should seek to deal less cavalierly with the parties it regulates, and to announce decisions in a form reflecting deliberation. . . . The Commission has really used an adjudicative proceeding where rule-making would seem a more appropriate method.* It is to be hoped that the Commission will refrain in the future from making major policy pronouncements in little publicized and unrepresentative proceedings." Note, 67 Colum. L. Rev., *supra*, at 1487-88 and n. 131.

June 30, 1967—four weeks *after* the FCC's initial letter ruling in this case. (R. 837-841.) According to the FCC, the FTC has concluded that cigarette commercials "still contain the two principal elements it [the FTC] found to exist in 1964—a portrayal of the desirability of smoking and assurances of the relative safety of smoking." (R. 838.) The FCC apparently regards this as a sufficient basis to dispense with any fact-finding process of its own, and beyond that, to hold irrelevant the text and contents of any particular cigarette advertisements, including the ones originally complained of.

But the FTC Report is a frail reed on which to rest a determination of such magnitude for the following reasons:

- (1) The gravamen of the 1967 FTC Report is that the FTC should now be given the power to require a warning in advertising which it asserted in 1964 and which Congress denied it in 1965 in the Cigarette Labeling Act. See 1967 FTC Report, p. 8. The FTC's 1967 conclusions as to the character of current cigarette advertising are little more than restatements and reaffirmations of the conclusions about cigarette advertising it reached in 1964 and propounded in its statement accompanying its proposed trade regulation rule. See 1967 FTC Report, pp. 14-15. Congress had that statement and those conclusions about cigarette advertising before it in 1965 when it passed the Cigarette Labeling Act. And it is plain that Congress rejected the FTC's position on the matter at that time, since the Act prevented the FTC from requiring the health warning in cigarette advertising which was embodied in the FTC's proposed Trade Regulation Rule. For the FCC to resurrect conclusions by the FTC rejected by Congress in 1965 and use them as the underlying evidentiary basis for a decision in 1967 is disingenuous.

- (2) Insofar as the FTC has performed any new fact-finding processes since 1964 and laid any new foundation for its conclusions as to cigarette advertising in its 1967 Report, its procedure for doing so was *ex parte*. No evidentiary or adjudicatory proceeding in the FTC preceded the issuance of the 1967 Report.
- (3) The nature of much of the material contained in the 1967 FTC Report inspires little confidence in its reliability as a source for decisions of any consequence. For example, the FTC cites "preliminary data" derived from a Public Health Survey in 1966, encompassing a total of 2073 interviews, as showing that 58 percent of those interviewed agreed with the proposition stated by the interviewer that "Current cigarette advertising leaves the impression that smoking is a healthy thing to do." 1967 FTC Report, Appendix B, pp. 6-7. The FCC in the present case in turn specifically relied on this piece of trivia as supporting its conclusion that current cigarette advertising expresses a point of view on the smoking and health issue. (R. 838.)

Material of this fragility is surely no substitute for detailed consideration and analysis of current cigarette advertising. Indeed, if such a survey were to be admitted as evidence and relied on as having substantial probative force in a contested adjudicative proceeding before either a trial court or an administrative agency, a reviewing court would be justified in brushing aside any conclusions based on it. It rises to no higher probative level when relied on by the FCC in what was essentially a nonadversary proceeding leading to a decision of enormous consequence for major industries and the public at large.

We submit that, at the minimum, the FCC should be held to have the duty of undertaking an independent examination into the character of current cigarette advertising, on proper notice and a proper record, and of making its own findings. It should not be entitled to rest on the warmed-over conclusions of another agency. Whether the present proceeding is deemed adjudicatory or in the nature of rule-making, its consequences are so important, as the FCC itself acknowledged, that the decision ought to be supported by fresh and first-hand facts and findings made in accordance with due process of law. Such an independent examination, we are confident, would reveal the untenability of the FCC's conclusion that cigarette advertisements express a point of view on the relation of smoking and health.

D. Cigarette Advertising Does Not Present a Viewpoint on the Smoking and Health Controversy

The FCC's conclusion that cigarette product advertising *per se* expresses one side of the smoking and health controversy runs counter to the present regulatory structure of cigarette advertising—governmental and industry-imposed. For if cigarette advertising claimed that smoking was not hazardous to health it would run squarely into restrictions already asserted by the FTC and imposed by broadcasting-industry codes.⁷⁹ Yet no one—including the FTC—has sought to prove that current cigarette advertising runs afoul of such restrictions.

When Congress enacted the Cigarette Labeling Act in 1965 and the FTC vacated its proposed trade regulation rule requiring a warning in cigarette advertising, the FTC asserted that it continued to have authority over any cigarette advertising making health claims. The FTC said:

“Having found that a health statement on cigarette packages is required in order that ‘the public may be

⁷⁹ The pertinent provision of the NAB Television Code is set forth in note 40, *supra*.

adequately informed that cigarette smoking may be hazardous to health' (Section 2(1) of the Act), Congress recognized that it would be inconsistent with the objectives of the Act for a manufacturer to be permitted to make advertising claims, or conduct an advertising campaign, which negate, contradict, or dilute the effectiveness of the cautionary statement on the packages. The Committee reports specifically enjoin the Commission to prohibit 'any advertising which tends to negate the warning which must be placed on the package in accordance with' the Act. S. Rept., page 6; see also H.R. Rept., page 5. *Thus, any cigarette advertising which contains any representation, express or implied, that tends to undermine the warning placed on the package would be unfair and deceptive, and could be ordered to be stopped. During the period in which the Commission is prevented by the terms of the Labeling Act from requiring a health statement in cigarette advertising, it will continue to monitor current practices and methods of cigarette advertising and promotion, and take all appropriate action consistent with that Act to prohibit cigarette advertising that violates the Federal Trade Commission Act.*" 30 Fed. Reg. 9485 (1965) (emphasis supplied).⁸⁰

In light of these affirmations of its authority to act against cigarette advertising, it is significant that the FTC has not brought a single proceeding with respect to such advertising since the Act was passed. This contrasts with the FTC's active role in former years. Between 1945 and 1960 the Commission completed seven formal cease-and-

⁸⁰ At the time of promulgating its proposed trade regulation rule, the FTC had stated that it was maintaining "a close and continuous scrutiny of cigarette advertising practices, and has been deeply attentive to the progress of medical research into the health aspects of cigarette smoking. The Commission's staff has monitored all cigarette advertising during this period, and continues to monitor it today." FTC Statement Accompanying Proposed Trade Regulation Rule, p. 2. It had also stated that "The Commission will maintain a close surveillance of the industry's efforts to eradicate, through voluntary efforts, all traces of unfairness and deception in affirmative representations or suggestions in all cigarette advertising and labeling." *Id.*, pp. 124-25.

desist order proceedings against cigarette manufacturers involving medical or health claims in advertising, and settled informally a number of other proceedings.⁸¹

All available indications therefore strongly militate against the FCC's dogmatic assertion that all cigarette advertising presents a point of view on the issue of the relation of smoking to health. The evidence is directly contrary. In the absence of any reliable evidence or findings supporting the FCC's conclusion as to the character of current cigarette advertising, its application of the "Fairness Doctrine" to cigarette advertising in the present case should be held invalid.

There is only one possible theory on which all cigarette advertising could be regarded as *per se* presenting a point of view on a controversial issue of public importance—and it would be even more destructive of the rationality of the "Fairness Doctrine." Although the FCC repeatedly stated in its opinion, and has reaffirmed since,⁸² that the controversial issue requiring the operation of the "Fairness Doctrine" in this case is whether cigarette smoking is a hazard to health, there is certain language in its opinion implying that it may have also regarded the question whether people should smoke cigarettes at all as the controversial issue. At one point it stated that "It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose." (R. 841.) At another point the FCC tried to justify ruling that the text of the particular advertisements was irrelevant by referring back to this formulation. (R. 851.)

⁸¹ FTC Statement accompanying proposed Trade Regulation Rule, p. 1; see also *Id.*, Appendix A, pp. 1-5. In 1955 the FTC promulgated Cigarette Advertising Guides, prohibiting representations in advertising "which refer to either the presence or absence of any physical effects from cigarette smoking" or "which in any other respects contain misleading implications concerning the health consequences of smoking cigarettes" *Id.*, p. 2.

⁸² See pp. 4, 5-6, 48 & n. 71, *supra*.

This contradiction in the FCC's opinion points up the muddled fashion in which it dealt with the problems posed by this case and its inability to fit its decision within the traditional contours of the "Fairness Doctrine." The opinion lurches in search of a controversial issue that will justify its novel application of the doctrine. But if the FCC could not satisfactorily resolve even this question and reach a consistent definition of the controversial issue supposedly triggering the operation of the doctrine, its conclusions must fail at the threshold.

In any event, to treat the controversial issue as the desirability of smoking cigarettes *vel non*—without regard to whether cigarette advertising addresses itself to the health issue—would distort the purposes of the "Fairness Doctrine" beyond recognition and simply turn it into an instrument for the regulation of all product advertising. If merely urging the public to use a certain product about which there is a dispute constitutes the expression of a point of view on one side of a controversial issue, then the only way a licensee could avoid triggering the "Fairness Doctrine" would be to stop carrying advertising for the product or to include in the advertising a warning about its use.

But both these outcomes would be contrary to the Congressional action of 1965. As the FCC itself recognizes, Congress clearly made the judgment that cigarette advertising should not be prohibited and that warnings as to any possible health hazards from smoking should not be required in advertising, but only on the cigarette package itself. Such an interpretation and application of the "Fairness Doctrine" would accomplish through the back door what Congress said shall not be required at all.

Moreover, if the issue invoking the "Fairness Doctrine" is the desirability of smoking *vel non*, then it is impossible for the FCC rationally to justify restricting its ruling to cigarette product advertising. If advertising urging the

use of a product triggers the "Fairness Doctrine," without regard to claims as to health or safety made in the advertisement, then all advertising for all products about which there is a health or safety controversy would be subject to the doctrine.

Any distinction which defined the controversial issue as "desirability of use" in the case of cigarette advertising but not for advertising of other controversial products would be arbitrary and discriminatory. It would constitute a judgment by the FCC on the merits of the underlying health controversy—that the hazards of smoking are such as to require application of the "Fairness Doctrine" in order to counteract the effects of cigarette advertising urging the desirability of smoking. It is precisely this kind of judgment on the merits of a controversy which, as we have shown, the FCC is forbidden to make under the "Fairness Doctrine."

IV. THE FCC'S "CLARIFICATION" DENYING CIGARETTE ADVERTISERS THE RIGHT OF REPLY UNDER THE "FAIRNESS DOCTRINE" TO PRESENTATION OF THE ANTI-SMOKING VIEWPOINT IS INVALID.

Even if the "Fairness Doctrine" were constitutional and could validly be applied to product advertising, and even if one product—cigarettes—could be singled out for operation of the doctrine on the basis of the procedures followed in this case, there is no justification in reason or equity for the FCC's interpretation of the doctrine so as to deny cigarette advertisers their proper right to reply to their critics.

Yet this is what the FCC's purported "clarification" in its letter of September 21, 1967, does. This "clarification" struck from the Commission's opinion of September 8, 1967, a crucial ruling that:

"The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of respon-

sible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials." (R. 882.)

Thus, although the FCC contemplated in its original decision that spokesmen for the cigarette advertisers should have the opportunity to make an explicit and reasoned presentation of their point of view in response to claims that smoking is hazardous, the FCC has now barricaded this avenue of reply from the operation of the "Fairness Doctrine."

It should be noted that this major change in the September 8 ruling was made with the same procedural carelessness that has characterized the FCC's actions throughout this case. The so-called "clarification" was issued in response to a letter from a single broadcaster. No opportunity to be heard or to comment on the issue was offered to any interested person, despite the fact that a number of broadcasters and advertisers had become parties to the administrative proceeding. No interested person was even given notice that the change was under consideration by the FCC. Indeed, petitions for judicial review had already been filed as to the September 8 ruling, which the FCC proceeded to change in this casual manner. These procedural deficiencies alone should invalidate the purported "clarification."

But the substantive defects in the FCC's change of position are even more glaring. The FCC blandly stated that:

"A licensee who has carried cigarette commercials has extensively covered one side of the issue on behalf of the cigarette companies, so that when he presents a significant amount of time devoted to the other side . . . he is under no obligation to present further materials on the first (pro-smoking) side requested by these companies or their spokesmen in your assumed case." (R. 883.)

The fallacies in this reasoning are self-evident. The FCC has equated cigarette commercials on the one hand with explicit presentations of the view that smoking is hazardous to health on the other. It has concluded that each is a sufficiently complete presentation of the respective points of view on this issue to satisfy the "Fairness Doctrine." But, as we have demonstrated, cigarette commercials do not—indeed, they cannot, under prevailing interpretation by the FTC of its power to control advertising and under current broadcasting codes—make claims that smoking is not hazardous to health. They do not contain the reasoned consideration and discussion of the complex question of the relationship of smoking and health which has been provided by the many authorities in the field who have concluded that the supposed hazards of smoking to health are unproven.

Moreover, even if cigarette commercials were deemed to constitute an implicit statement of a view on this issue sufficient to trigger the "Fairness Doctrine"—which we deny—they certainly do not contain the explicit and detailed discussion of the issue which the FCC contemplates will be present on behalf of the anti-smoking point of view. The FCC evidently envisages a wide range of anti-smoking broadcasts to counteract the supposed effects of cigarette commercials—from spot announcements prepared by such agencies as HEW or the American Cancer Society, to "appropriate" news reports and discussion programs. (R. 17.) For the FCC to regard cigarette commercials as constituting an adequate presentation of the cigarette industry's side of this complex issue of smoking and health is the negation of the "fairness" which the "Fairness Doctrine" is ostensibly intended to promote. It is rationally impossible to conclude, as the FCC has done, that as a matter of law, the industry's side of the smoking and health issue has been fairly and sufficiently presented simply by ciga-

rette commercials.⁸³ Opportunity must be afforded this side to make its points and contentions explicitly.

Given this opportunity, spokesmen for the cigarette manufacturers will be able to present the scientific evidence showing that the alleged causal relationship of smoking to various diseases remains unproved; to point out the defects in the statistics used to support this relationship; to demonstrate that empirical evidence of the relationship is lacking; and to show that smoking has certain benefits to health, as the Surgeon General's Advisory Committee itself recognized.

As the FCC has repeatedly recognized, licensees have discretion to assure that any such right of response must be in fact responsive and must not go "unreasonably far afield as to the issues."⁸⁴ All that petitioners assert in this regard is the right of responsible spokesmen for their point of view to address themselves explicitly to the contentions that cigarette smoking is hazardous to health on the same terms and conditions granted by licensees to anti-smoking proponents.⁸⁵

⁸³ Indeed, in a subsequent ruling, the FCC seems implicitly to have recognized that this is so. A licensee inquired as to its "Fairness Doctrine" obligation in the situation in which it carries no cigarette commercials but does carry anti-smoking announcements. The FCC held the doctrine applicable in this situation, stating:

"The Commission is of the view that when a reasonable opportunity is afforded for the presentation of opposing views on an issue of public importance, so that all facts relating to the controversy are exposed, the public will have the benefit of full information concerning it."

The FCC emphasized that, in fulfilling its obligations in this instance, presumably to air the industry's point of view, the licensee had discretion "to choose an appropriate spokesman and the format (e.g., forum discussions, short talk programs, news coverage, etc.)". Letter to Larry Jonas, KBMC-FM, Nov. 2, 1967 (FCC Log No. C9-1304). (Emphasis supplied.)

Thus the FCC itself seems to regard programs explicitly discussing a controversial issue as the way to provide the public with "all facts" and "full information." Commercials do not fulfill that role and are not adequate for the purpose of achieving balanced presentation.

⁸⁴ Letter to Hon. Oren Harris, September 20, 1963, 3 R.R. 2d 163, 167 (1963); Letter to Allen M. Woodall, January 19, 1965 (FCC 65-50).

⁸⁵ Cf. *Red Lion Broadcasting Co. v. FCC*, *supra*, 381 F. 2d at 926, 930.

Otherwise, if the FCC's "clarification" is allowed to stand, what emerges will not be a balanced presentation of both sides of the issue of the relation of smoking and health, but rather a one-sided consideration of the issue, loaded in favor of the anti-smoking point of view. But the FCC has no right to weight the scales of discussion on controversial issues of public importance. It betrays its own professed objectives of assuring a fully informed public opinion when it does so. "Fairness" requires that, if one side of the smoking and health controversy is explicitly and completely presented, the other side should also be explicitly and completely presented so that the members of the public may make up their own minds.

CONCLUSION

For the foregoing reasons, the rulings of the Federal Communications Commission under review should be declared unlawful and set aside.

Respectfully submitted,

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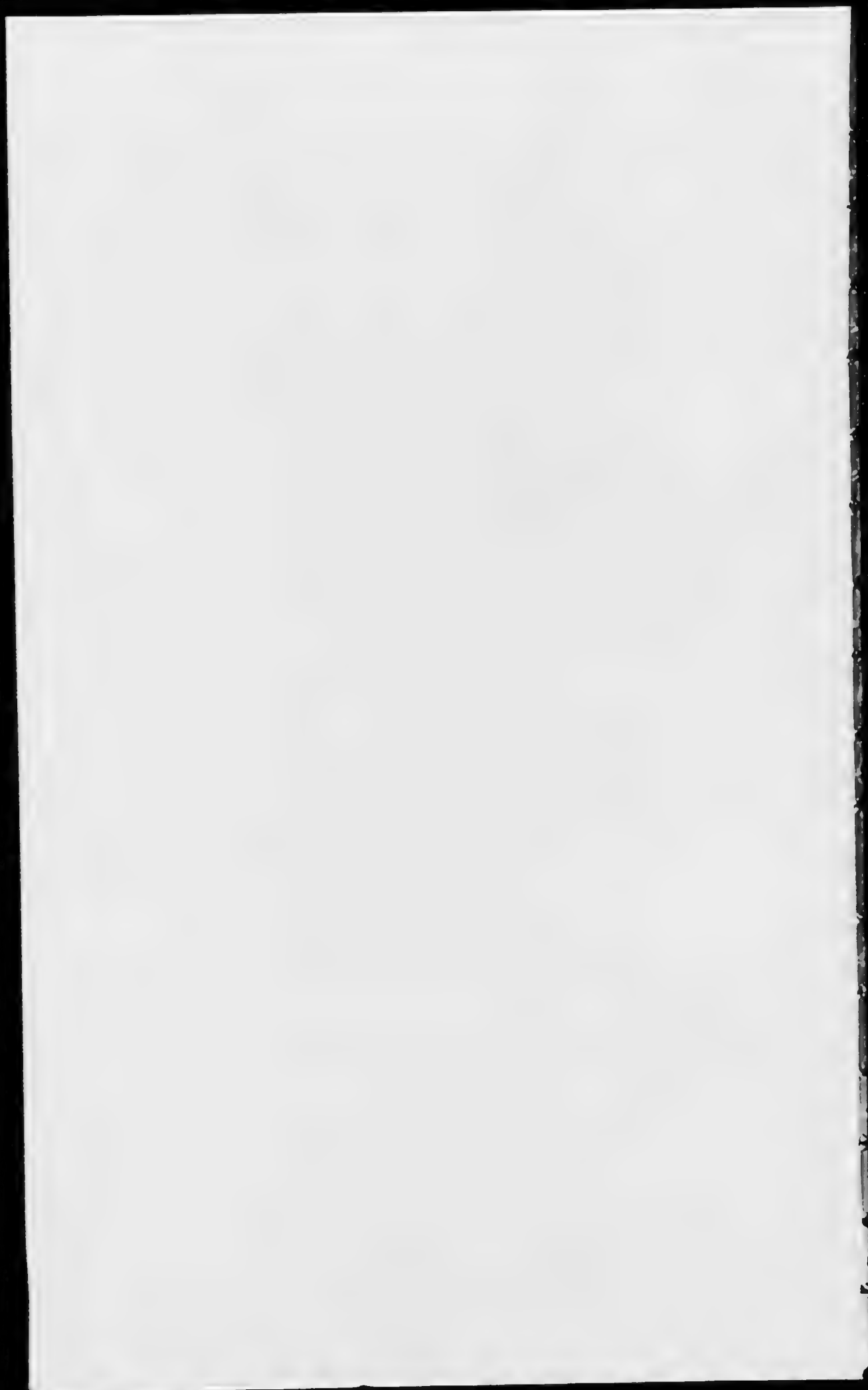
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February 28, 1968



APPENDIX A

Section 315(a) of the Communication Act of 1934, 48 Stat. 1088, as amended, 73 Stat. 557 (1959), 47 U.S.C. § 315(a) provides:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary),
or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

The Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. §§ 1331-39, provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
That this Act may be cited as the "Federal Cigarette Labeling and Advertising Act".

DECLARATION OF POLICY

SEC. 2. It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

DEFINITIONS

SEC. 3. As used in this Act—

(1) The term "cigarette" means—

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

(2) The term "commerce" means (A) commerce between any State, the District of Columbia, the Com-

monwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island and any place outside thereof; (B) commerce between points in any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island, but through any place outside thereof; or (C) commerce wholly within the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island.

(3) The term "United States", when used in a geographical sense, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, and Johnston Island.

(4) The term "package" means a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers.

(5) The term "person" means an individual, partnership, corporation, or any other business or legal entity.

(6) The term "sale or distribution" includes sampling or any other distribution not for sale.

LABELING

SEC. 4. It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

PREEMPTION

SEC. 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

(c) Except as is otherwise provided in subsections (a) and (b), nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes, nor to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any cigarette advertisement.

(d)(1) The Secretary of Health, Education, and Welfare shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually thereafter, concerning (A) current information on the health consequences of smoking and (B) such recommendations for legislation as he may deem appropriate.

(2) The Federal Trade Commission shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

CRIMINAL PENALTY

SEC. 6. Any person who violates the provisions of this Act shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than \$10,000.



INJUNCTION PROCEEDINGS

SEC. 7. The several district courts of the United States are invested with jurisdiction, for cause shown, to prevent and restrain violations of this Act upon the application of the Attorney General of the United States acting through the several United States attorneys in their several districts.

CIGARETTES FOR EXPORT

SEC. 8. Packages of cigarettes manufactured, imported, or packaged (1) for export from the United States or (2) for delivery to a vessel or aircraft, as supplies, for consumption beyond the jurisdiction of the internal revenue laws of the United States shall be exempt from the requirements of this Act, but such exemptions shall not apply to cigarettes manufactured, imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside of the United States.

SEPARABILITY

SEC. 9. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the other provisions of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

TERMINATION OF PROVISIONS AFFECTING REGULATION OF
ADVERTISING

✓ SEC. 10. The provisions of this Act which affect the regulation of advertising shall terminate on July 1, 1969, but such termination shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to the date of enactment of this Act. ✓

EFFECTIVE DATE

SEC. 11. This Act shall take effect on January 1, 1966.

APPENDIX B

Comments of the Federal Communications Commission on S. 547, 89th Congress, a Bill To Confer Upon the Federal Trade Commission the Power and Duty To Regulate the Advertising and Labeling of Cigarettes, and on S. 559, 89th Congress, a Bill To Regulate the Labeling of Cigarettes*

S. 547 directs the Federal Trade Commission, with the cooperation of the Secretary of Health, Education, and Welfare, to establish such standards and requirements for the labeling and advertising of cigarettes which are in commerce as it may deem necessary to protect the public health.

It further provides that such standards and requirements for the labeling of cigarettes shall include the requirement that each package or container in which cigarettes are offered for sale to consumers bear a clear and distinct label which (1) contains the specific wording: "Caution—Habitual Smoking Is Injurious to Health," and (2) sets forth the average yield, or other index, of each incriminated agent to be found in the smoke of cigarettes contained in such package or container.

With respect to advertising of cigarettes, S. 547 would require that (1) each advertisement contain the following warning: "Caution—Habitual Cigarette Smoking Is Injurious to Health," and (2) that the FTC provide for the elimination of all advertising which tends to make cigarette smoking attractive to children. The bill empowers and directs the FTC to take punitive measures against offenders.

S. 559 omits any reference to advertising and provides that it shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which (1) fails

* Reprinted in S. Rep. No. 195, 89th Cong., 1st Sess., pp. 12-14.



to bear the prominently located statement, "Warning: Continual Cigarette Smoking May Be Hazardous to Your Health," or (2) fails to state the average tar and nicotine yields per cigarette as determined by a defined Chambridge filter method or such other method approved by the National Bureau of Standards. The bill provides that no other warning requirement shall be imposed on cigarette labeling or packaging by any Federal, State, or local authority. Violations are punishable by a fine of not more than \$100,000. Enforcement would be in the district courts upon application of the Attorney General of the United States.

The Federal Trade Commission has, of course, taken action in this field. The Federal Trade Commission on June 22, 1964, adopted a rule¹ effective January 1, 1965, later amended² to become effective July 1, 1965, requiring that all cigarette packages and containers carry a warning to the effect that smoking is dangerous to health and may cause death from cancer and other diseases. The trade regulation rule also contains a requirement, effective July 1, 1965, covering a health warning in cigarette advertising.

The Federal Communications Commission's interest in this matter is necessarily limited to the use of broadcast media for cigarette advertising. It seems clearly appropriate, however, that the matter of cigarette advertising be treated on an all-inclusive, across-the-board basis, rather than in a piecemeal fashion. Since the Federal Trade Commission has undertaken to deal comprehensively with the remedial action needed to protect the public in the light of the report on smoking and health, issued January

¹"Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule" (29 F.R. 8324, July 2, 1964).

² 29 F.R. 15570, Nov. 20, 1964.

11, 1964, by the Advisory Committee to the Surgeon General, the Federal Communications Commission has not held proceedings, or undertaken studies, to evaluate the various factors and considerations in this area. While we believe that some action on an overall basis is appropriate, we are thus not in a position to make recommendations to the Congress in this field, and specifically, as to whether S. 547 or S. 559 should be enacted.

The Commission recognizes the importance of this matter. In exercising its public interest responsibilities in connection with broadcast licensees, it will, of course, cooperate in the application of whatever Federal law, policy, or regulations are adopted in this area.

(Adopted: Feb. 10, 1965.)

BRIEF OF INTERVENORS
NATIONAL BROADCASTING COMPANY, INC.,
AMERICAN BROADCASTING COMPANIES, INC.
AND WLLE, INC.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 21,285

JOHN F. BANZHAF, III,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

FILED MAR 7 1968

No. 21,525

No. 21,526

National & WTBE-TV, INC., and NATIONAL
ASSOCIATION OF BROADCASTERS,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

No. 21,577

THE TOBACCO INSTITUTE, INC.,
THE AMERICAN TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO
CORPORATION, *et al.,*

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

PETITION TO REVIEW AND SET ASIDE AN
ORDER OF THE FEDERAL COMMUNICATIONS
COMMISSION

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Statement of Questions Presented.

Counsel for the parties stipulated that the following questions were presented for review in these proceedings:

The Federal Communications Commission has ruled that radio and television stations that broadcast any cigarette commercials must broadcast on a regular basis material presenting the viewpoint that cigarette smoking may be a hazard to the smoker's health. The issues presented by this ruling are:

1. Whether this ruling is precluded by reason of the Federal Cigarette Labeling and Advertising Act and the congressional purposes and findings that underlie this statute.
2. Whether the Commission's ruling contravenes the First, Fifth or Ninth Amendments to the Constitution.
3. Whether this ruling is in excess of the Commission's statutory authority, constitutes an abuse of discretion, is arbitrary or capricious or is otherwise unlawful.
4. Whether, in adopting this ruling, the Commission observed the procedures required by law.
5. Whether, if the ruling is otherwise valid, the Commission erred in ruling further that licensees who broadcast cigarette commercials and who grant a significant amount of time to spokesmen for the view that smoking may be hazardous are not obligated to grant reply time to cigarette manufacturers.



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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOHN F. BANZHAF, III,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

Case No. 21,285

WTRF-TV, Inc., and NATIONAL ASSOCIA-
TION OF BROADCASTERS,
AMERICAN BROADCASTING COMPANIES,
Inc.,
THE TOBACCO INSTITUTE, Inc. *et al.*,
Intervenors.

WTRF-TV, Inc., and NATIONAL ASSOCIA-
TION OF BROADCASTERS,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

Case No. 21,525

Case No. 21,526

SPARTAN RADIOCASTING Co.,
PALMETTO RADIO CORP.,
WAVE, Inc., *et al.*,
Intervenors.

THE TOBACCO INSTITUTE, Inc.,
THE AMERICAN TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO
CORPORATION,
LARUS & BROTHER COMPANY, Inc.,
LIGGETT & MYERS TOBACCO COMPANY,
PHILIP MORRIS Inc.,
R. J. REYNOLDS TOBACCO COMPANY,
UNITED STATES TOBACCO COMPANY and
P. LORILLARD COMPANY,
Petitioners,

Case No. 21,577

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

**Brief of Intervenor
National Broadcasting Company, Inc., American
Broadcasting Companies, Inc. and WLLE, Inc.**

Jurisdictional Statement.

National Broadcasting Company, Inc., American Broadcasting Companies, Inc. and WLLE, Inc. (hereinafter "NBC", "ABC", "WLLE" or "Intervenor") were granted leave by the United States Court of Appeals for the Fourth Circuit to intervene in proceedings brought by WTRF-TV, Inc. and the National Association of Broadcasters for review of a ruling of June 2, 1967 (R. 15-17)* by the Federal Communications Commission (hereinafter "FCC" or "Commission") and a Memorandum Opinion and Order of the Commission adopted on September 8 and released on September 13, 1967 (R. 814-874), 9 F. C. C. 2d 921 (1967) (hereinafter "Memorandum Opinion") which, on reconsideration, reaffirmed the June 2, 1967 ruling.

Jurisdiction was based on Section 402(a) of the Communications Act of 1934, as amended, 47 U. S. C. §402(a), 48 Stat. 1093, Sections 2 and 8 of the Judicial Review Act of 1950, 28 U. S. C. §2342, 80 Stat. 622 and 28 U. S. C. §2348, 80 Stat. 623, Section 10 of the Administrative Procedure Act, 5 U. S. C. §§701-06, 80 Stat. 378 and 28 U. S. C. §2112, 72 Stat. 941. Intervenor was parties in interest in the proceedings before the FCC for review of the ruling of June 2, 1967 (R. 167-208, 403-20 and 421-26) whose interests will be affected if this ruling is not set aside.

The proceedings in the Fourth Circuit were subsequently transferred to this Circuit (Case Nos. 21,525 and 21,526) and consolidated with a prior proceeding (Case No. 21,285) filed in this Circuit by John F. Banzhaf III for review of the same Memorandum Opinion.

* References in the form "R. " are to page numbers of the original record in this Court.

Statement of the Case.

Proceedings before the Federal Communications Commission.

The proceedings leading to the adoption of the ruling here under attack were initiated by a complaint against Station WCBS-TV, New York, dated January 5, 1967 (R. 1-8), filed by Mr. Banzhaf with the FCC. This complaint asserted that WCBS-TV, after having aired numerous commercial advertisements for cigarette manufacturers, had not afforded some responsible spokesman an opportunity to present contrasting views on the issue of the benefits and advisability of smoking as required by the Commission's "fairness doctrine."

The letter of complaint referred to three particular commercials and requested that free time, roughly approximating that spent on the cigarette commercials, be made available to responsible groups for presentation of the view that smoking is harmful to health.

The FCC, without having before it the advertisements referred to in the complaint and without affording WCBS-TV an opportunity to reply to the complaint, ruled by letter dated June 2, 1967 (R. 15-17), that its so-called "fairness doctrine" is applicable to cigarette advertising.

The Commission said:

"The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health." (R. 16)

The Commission went on to point out that although WCBS-TV had presented on its station programs which took the position that smoking was harmful to health, the Commission was offering the guidelines set forth in its

letter so that WCBS-TV could determine whether it was meeting its obligations under the "fairness doctrine" *on a weekly basis*.

Since the Commission had not advised WCBS-TV of the complaint and since the ruling affected the entire industry, CBS, NBC, ABC, the National Association of Broadcasters, and other broadcasters petitioned the Commission for reconsideration of its ruling. In reply to these motions the FCC adopted the Memorandum Opinion (R. 814-874) essentially reaffirming the ruling set forth in the letter of June 2, 1967.

Intervenors are vitally affected by the Memorandum Opinion, since they own and operate, pursuant to license from the FCC, television broadcast stations, standard broadcast stations and frequency modulation broadcast stations. These stations carry cigarette advertising. NBC and ABC also own and operate television networks and radio networks not licensed by the FCC which furnish cigarette advertising to several hundred radio and television broadcast stations.

Development of FCC Policy Leading to the Adoption of the Fairness Doctrine.

The evolution of the Commission's so-called "fairness doctrine" provides the backdrop for a consideration of the validity of its application of that doctrine to cigarette advertising.

At the time Congress passed the Radio Act of 1927, it explicitly considered whether or not radio broadcasters should be required to give equal time to candidates for public office and it also considered the extent to which a licensee should be required to provide equal opportunity for a hearing to divergent viewpoints with respect to issues affecting the public.

The bill reported by the Senate Committee had contained a provision stating:

"If any licensee shall permit a broadcasting station to be used . . . by a candidate or candidates for any

public office, or for the discussion of any question affecting the public, he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce." 67 Cong. Rec. 12503 (1926). (Emphasis added.)*

This provision was stricken from the bill on the floor of the Senate, after extensive debate, and Section 18 of the Radio Act of 1927, as it was enacted, provided only that, if any legally qualified candidate for public office is allowed the use of a broadcasting station by a licensee, all other such candidates must be afforded equal opportunity for the use of the station.

The Federal Radio Commission, which was created by this Act, indicated, early in its history, that "[i]n so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views . . .". The Commission went on to say, however, that the great majority of broadcasting stations were acting responsibly in this area and were thereby "tacitly recognizing a broader duty than the law imposes on them." *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929), *rev'd on other grounds*, 59 App. D. C. 197, 37 F. 2d 993 (D. C. Cir.), *cert. dismissed*, 281 U. S. 706 (1930). (Emphasis added.)

The FRC comment in the *Great Lakes* case was in a context in which it announced the proposition that broadcasting stations were "not for the purpose of furthering the private or selfish interests of individuals or groups of individuals" and that "propaganda stations" would be disfavored in competitive applications. In a number of other cases between 1929 and 1941 the FRC applied this same principle. *E.g.*, *Chicago Federation of Labor v. Federal Radio Commission*, 3 F.R.C. Ann. Rep. 36, *aff'd*, 59 App. D. C. 333, 41 F. 2d 422 (D. C. Cir. 1930); *KFKB Broadcasting Ass'n. v. Federal Radio Commission*, 60 App. D. C. 79, 47 F. 2d 670 (D. C. Cir. 1931); *Trinity*

* See S. Rep. No. 772, 69th Cong., 1st Sess. 4 (1926).

Methodist Church, South v. Federal Radio Commission, 61 App. D. C. 311, 62 F. 2d 850 (D. C. Cir. 1932), *cert. denied*, 288 U. S. 599 (1933). The reach of the FRC's policy during this period was apparently no further than to deny a license to an applicant whose intention was to use the facilities as a mouthpiece for a single group or point of view.

In 1933 the 72nd Congress adopted a bill (H. R. 7716) which would have amended Section 18 to extend the "equal opportunities" requirement to situations where a broadcasting station was used "in support of or in opposition to any candidate for public office, *or in the presentation of views on a public question to be voted upon at any election, or by a government agency . . .*" Emphasis added. The report of the House conferees stated: "This amendment broadens section 18 . . . [it is] designed to insure equality of treatment to candidates for public office, those speaking in support of or in opposition to any candidate for public office, or in the presentation of views on public questions." H. R. Rep. No. 2106, 72d Cong., 2d Sess. 6 (1933). The bill, however, was pocket-vetoed by President Hoover and never became law.

In the following Congress, which enacted the Communications Act of 1934, the Senate Committee reported a bill containing a proposed Section 315 identical to the proposed amendment to Section 18 included in H. R. 7716, discussed above. S. Rep. No. 781, 73d Cong., 2d Sess. 8 (1934). Although this bill was adopted by the Senate, the House refused, in conference, to accede to the Senate provision, and Section 315 was enacted in language identical to Section 18 of the 1927 Act. See H. R. Rep. No. 1918, 73d Cong., 2d Sess. (1934). Between 1937 and 1941 other bills proposing broader requirements that different viewpoints be broadcast were considered by Congress, but not adopted.*

* See H. R. 3039, 75th Cong., 1st Sess. (1937) (broadcasters to set aside regular and definite periods for uncensored discussions of public questions and to afford at least one exponent of each opposing viewpoint equivalent facilities); S. 635, 76th Cong., 1st Sess. (1939) (similar to H. R. 3039); S. 1333 and H. R. 3595, 80th Cong., 1st Sess. (1947) (equal opportunities required for the presentation of different views whenever one viewpoint has been presented).

Despite the refusal of Congress to broaden the statutory requirements with respect to "equality" or "fairness" the FCC, successor to the FRC, went far beyond its ruling in the *Great Lakes* case, and its policy for the decade following that decision, when it ruled in *Mayflower Broadcasting Corporation*, 8 F. C. C. 333 (1941), that a licensee could not be an advocate. Although the Commission actually held that since the applicant had agreed to cease broadcasting editorials it would be appropriate to renew its license, the *Mayflower* decision was taken as a blanket prohibition of editorializing by licensees.

Eight years later, in 1949, after public hearings on the question of editorializing by licensees, the FCC reversed the policy enunciated in the *Mayflower* case and, in its REPORT IN THE MATTER OF EDITORIALIZING BY BROADCAST LICENSEES, 13 F. C. C. 1246, 25 R. R. 1901 (1949) (hereinafter "REPORT ON EDITORIALIZING"), it specifically endorsed editorializing by station licensees. In doing so the Commission set out generally its views with respect to broadcasting on controversial issues. These views, with their later developments, have since been collectively referred to as the "fairness doctrine." Among other things, the Commission emphasized that radio can only be effectively maintained as a medium of free speech if the licensee exercises his discretion so as to afford "a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be afforded radio time" and that the licensee must play a "conscious and positive role in bringing about balanced presentation of the opposing viewpoints." 13 F. C. C. 1250-51 (1949). (Emphasis added.) The Commission also abjured the imposition of "rigid requirements" because they would "seriously limit the ability of licensees to serve the public interest." 13 F. C. C. at 1250.

The Commission was also careful to point out in its report that its "actual consideration" of the adequacy of a licensee's service had "always been limited to a determination as to whether the licensee's programming, taken as a whole, demonstrates that the licensee is aware of his

listening public and is willing and able to make honest and reasonable effort to live up to such obligations." 13 F. C. C. at 1255. Thus the licensee's action in carrying or refusing to carry particular programs "is of relevance only as the station's actions with respect to such programs fits into its overall pattern of broadcast service" 13 F. C. C. at 1255.

In 1959 the FCC's decision in *CBS, Inc.* (Lar Daly case), 18 R. R. 701 (1959), that the appearance of a candidate in the course of a newscast was a "use" of a broadcasting station within the meaning of Section 315(a) of the Communications Act, prompted Congress to amend Section 315(a) by adding a sentence exempting from the "equal opportunities" requirement appearances of candidates on "bona fide newscasts," "bona fide news interviews," "bona fide news documentaries," and "on-the-spot coverage of bona fide news events." The amendment added a second sentence which reads:

"Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U. S. C. §315(a) (1964).

Although the FCC has since maintained that this was a ratification of the "fairness doctrine" by Congress, subsequent legislation from time to time considered by Congress which would have explicitly broadened the equal time requirement beyond the bounds prescribed by Section 315(a) was never adopted.*

* H. R. 7612, 88th Cong., 1st Sess. (1963) (opportunity for response required when an individual subjected to ridicule by a candidate utilizing equal time pursuant to Section 315); H. R. 7072, 88th Cong., 1st Sess. (1963) (equal time to be offered opponent when station editorializes favoring one candidate or opposing his opponent).

It was not until the issuance of a Public Notice dated July 26, 1963, FCC 63-734, 25 R. R. 1899 (1963), that the Commission began to shift its emphasis from the consideration of fairness in the context of the station's overall programming for renewal purposes to the imposition of program-by-program requirements with respect to the licensee's programming on controversial issues.*

The 1963 Public Notice attempted to formalize the Commission's policy in three areas. The first two requirements related, respectively, to the allowance of reply time to personal attacks and the allowance of reply time to editorials supporting or opposing candidates. The third requirement was as follows:

"(c) When a licensee permits the use of his facilities for the presentation of views regarding an issue of current importance such as racial segregation, integration, or discrimination, or any other issue of public importance, he must offer spokesmen for all responsible groups within the community similar opportunities for the expression of the viewpoints of their respective groups. In particular, the views of the leaders of the Negro and other community groups as to the issue of racial segregation, integration, or discrimination, and of the leaders of appropriate groups in the community as to other issues of public importance, must obviously be considered and reflected, in order to insure that fairness is achieved with respect to programming dealing with such controversial issues."

The issuance of this Public Notice was followed in 1964 by the FCC's issuance of the so-called "Fairness Primer." Public Notice of July 1, 1964, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415, 2 R.R. 2d 1901 (1964). In the "Primer" the FCC reiterated the requirements of the 1949 REPORT ON EDITORIALIZING and summarized the rulings

* The requirements of the 1963 Public Notice were anticipated, in part, by several cases acted on by the Commission in 1962. *Clayton W. Mapoles*, 23 R. R. 586 (1962); *Billings Broadcasting Co.*, 23 R. R. 951 (1962); *Times-Mirror Broadcasting Co.*, 24 R. R. 404 (1962).

in the matters on which it had acted since 1949 relating in some way to the "fairness doctrine."

The FCC in its letter to *John H. Morris*, 1 F.C.C. 2d at 1587 (1965), further amplified its policy by ruling that the subject of a "personal attack" on a program involving a controversial issue of public importance must be given free time to respond to that attack.

By its Notice of Proposed Rule Making (FCC 66-291) issued on April 6, 1966 (31 Fed. Reg. 5710) the Commission sought to formalize and facilitate the program-by-program application of the "personal attack" and "political editorializing" aspects of the "fairness doctrine." In adopting the rule in 1967, the Commission noted that one of its principal purposes was to put the Commission "in a position to impose appropriate forfeitures (section 503(b) of the Act) in cases of clear violations by licensees which would not warrant designating their applications for hearing at renewal time or instituting revocation proceedings but on the other hand do warrant more than a mere letter of reprimand." 32 Fed. Reg. 10303.

This Court upheld the Commission's ruling with respect to application of the "fairness doctrine" to a personal attack in *Red Lion Broadcasting Co. v. FCC*, — App. D. C. —, 381 F. 2d 908 (D. C. Cir. 1967). Certiorari has been granted by the Supreme Court in that case. The "fairness doctrine" rules relating to "personal attacks" and "political editorializing" adopted by the Commission in 1967 pursuant to its Notice of Proposed Rule Making dated April 6, 1966, 31 Fed. Reg. 5710 are presently being attacked on constitutional grounds by broadcasters in the Court of Appeals for the Seventh Circuit. *Radio Television News Directors Association (RTNDA), et al. v. FCC*. The Supreme Court recently ruled that it would postpone argument in the *Red Lion* case until a decision by the Court of Appeals for the Seventh Circuit in the *RTNDA* case and action by the Supreme Court on any petition for certiorari from that decision. Order of January 29, 1968.

In spite of the fact that the "fairness doctrine" was being attacked as unconstitutional in the Courts of Appeals

and the Supreme Court, on September 8, 1967 the Commission adopted the Memorandum Opinion ruling here under attack that the "fairness doctrine" applies to cigarette advertising, regardless of the content of that advertising, and that it requires that a response to such advertising be provided on a weekly basis.

Statutes Involved.

Set out in the Appendix hereto are the provisions of Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 73 Stat. 557 (1959), 47 U. S. C. §315(a), and the provisions of the Federal Cigarette Labeling and Advertising Act of 1965, 79 Stat. 282 (1965), 15 U. S. C. §§1331-39.

Statement of Points.

The Commission's Memorandum Opinion and Order of September 8, 1967 and ruling of June 2, 1967 should be set aside for the following reasons:

1. The Commission acted in an area which Congress had preempted by enactment of the Federal Cigarette Labeling and Advertising Act of 1965;
2. The action taken by the Commission is arbitrary and capricious and an abuse of discretion;
3. There is no statutory basis in the Communications Act of 1934 or any amendment to it, for the Commission's ruling; and
4. The application of the "fairness doctrine" in this case infringes upon the First Amendment's guarantee of a free press.

Summary of Argument.

1. The Commission's ruling is in direct conflict with the requirements of the Federal Cigarette Labeling and Advertising Act of 1965, 79 Stat. 282 (hereinafter sometimes referred to as "Cigarette Act" or "Act"). In that Act, Congress adopted a comprehensive program with respect to the relationship between smoking and health and the steps to be taken to advise the public concerning that problem. By sections 5 and 10 of the Cigarette Act, Congress specifically prohibited the adoption, prior to July 1, 1969, of any additional regulation of cigarette advertising. It was the conscious and explicit judgment of Congress, in the light of the competing considerations before it, and in view of the conflicting data submitted to it, that there be a moratorium on further regulatory action until it had had an opportunity to assess the effect of the new labeling requirement imposed by the Cigarette Act, the self regulatory codes already in existence, and the educational campaigns under way. The action of the FCC, based on no investigation of its own and on no data not available to Congress before adoption of the Cigarette Act, is a violation of the moratorium imposed by Congress and an impermissible infringement upon and interference with the comprehensive regulatory scheme which Congress enacted.

2. The action taken by the Commission is, in any event, arbitrary and capricious. It was arbitrary for the Commission to conclude that cigarette advertisements, whatever their content, constitute an expression of views on the question whether cigarette smoking is harmful to health. Moreover, the Commission has arbitrarily deviated from prior statements of its policy in substituting its own judgment for that of its licensees as to whether such advertisements constitute an expression of views on a controversial issue. Finally, the Commission's action is arbitrary in that it is expressly limited by the Commission to cigarette advertising. Where no health issue is in fact discussed, cigarette advertising is no more controversial than advertising for

any other products whose use might collaterally involve health or safety issues.

3. There is no statutory basis in the Communications Act of 1934, or any amendment to it, for the Commission's ruling. The authority given the Commission to consider the "public interest, convenience and necessity" in issuing licenses does not carry with it an authorization to engage in the censorship implicit in rulings or policies which suppress or compel the expression by broadcasters of particular views. The power to regulate the exercise of rights protected by the First Amendment may not be inferred from vague authorization of this sort. Moreover, such action is plainly contrary to the requirements of Section 326 of the Communications Act forbidding the Commission to engage in censorship.

4. The fairness doctrine in its specific application in this case, infringes upon the First Amendment's guarantee of a free press. Broadcasting is an important part of the press which is protected by the First Amendment since it constitutes a major source of news and information for the public.

The Commission's policies impair free expression by broadcasters both by discouraging the broadcasting of material which might give rise to an obligation to permit response and by compelling broadcasters to carry particular programming. By the application of its vague policies in this area the Commission is able to exercise a powerful influence over the content of what is broadcast on controversial questions. Governmental compulsion of the expression of views is as offensive to the First Amendment as is governmental suppression of views. In either case the independence of the press is threatened and a capacity is created in the Government to regulate what the public will be told. It is this threat that the First Amendment was designed to meet.

ARGUMENT.

I.

By Enacting the Federal Cigarette Labeling and Advertising Act of 1965 Congress Preempted the Field so that the FCC May Not Require Stations Carrying Cigarette Advertisements to Provide Time for Rebuttal.

In its letter dated June 2, 1967 to WCBS-TV New York, the FCC ruled that a station which carries cigarette advertisements has the duty of "informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health." In the Memorandum Opinion and Order reaffirming the ruling, the Commission recognized that the Federal Cigarette Labeling and Advertising Act of 1965, 79 Stat. 282, has preempted all "Federal, State and Local activity to compel health warnings in cigarette advertising" but interpreted such preemption to preclude it only from requiring statements to be made in the text of cigarette advertisements or adjacent thereto. 9 F. C. C. 2d at 929. In the Commission's view, its regulatory power remains otherwise intact, except that it may not take drastic steps which will completely eliminate or substantially curtail cigarette advertising. According to the Commission, requiring "equal time" for the anti-smoking presentations would be such a drastic step and is, therefore, not permissible, but requiring a "significant amount of time" for the other viewpoint on a regular basis implements the smoking education campaign promoted by Congress and is consistent with Congressional intent.

It is the position of intervenors that Congress intended to and did establish a comprehensive Federal program dealing with the problem of smoking and health as it relates to cigarette advertising and that, for the limited period of three years, Federal agencies such as the FCC may not go

beyond the limits marked out by Congress in restricting or regulating cigarette advertising because of the health hazards of smoking. When Congress has preempted a field, as is the case here, Federal agencies not given any implementing authority by Congress have no power to take additional measures even if in their opinion such measures merely supplement the Congressional scheme. Where there is comprehensive legislation, such as Congress enacted in connection with the issue of cigarettes and health, purposeful omission is as significant as commission and the vacuum intentionally left by Congress may not be filled by others no matter how well-meaning they may be. Moreover, the FCC's action is not only inconsistent with the intent implicit in the comprehensiveness of the Congressional scheme but it also contravenes the statute's explicit language.

(A) The Cigarette Labeling and Advertising Act of 1965 was Conceived as a Comprehensive Federal Program and the FCC May Not Interfere in this Field

Section 2 of the Act entitled "Congressional Declaration of Policy and Purpose" states that:

*"It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health * * *."* Emphasis added.

This language leaves no doubt that Congress intended to enact comprehensive legislation with respect to the relationship between smoking and health. The legislative history of the Act clearly shows that Congress studied all of the many facets of the relationship and took all remedial action it considered necessary and proper at this time.

After the publication in January, 1964 of the Surgeon General's Advisory Committee Report on the health hazards of smoking, the House Commerce Committee conducted hearings from June 23, 1964 through July 1, 1964 concerning possible action by Congress in this field. Since the second session of the 88th Congress was coming to a

close, time did not permit further hearings and the consideration of appropriate legislation.

Both the House and the Senate Commerce Committees conducted extensive hearings in the first session of the 89th Congress in connection with the bills which led to the adoption of the Cigarette Act of 1965. The transcript of the Senate Commerce Committee hearings between March 22 and April 2, 1965 is more than 1,500 pages long and includes detailed conflicting testimony by experts and other interested persons on the health hazards of smoking and on what remedial action, if any, is needed to make whatever hazards exist known to the public.* Cigarette promotion in the mass media was discussed in the hearings and the existing controls, such as the Cigarette Advertising Code and the FTC power over deceptive or misleading advertisements, were evaluated during these hearings. An examination of the testimony adduced makes evident the complexity of the economic, social, and medical factors involved, and the necessity for caution in imposing drastic and ill-considered regulatory requirements.

S. 547, introduced by Senator Neuberger, contemplated the regulation of cigarette advertising in a major way. Section 5(a) empowered the FTC "to establish such standards and requirements for the . . . advertising of cigarettes . . . as it may deem necessary to protect the public health". Section 5(c)(1) made it mandatory that each cigarette advertisement contain the following warning: "Caution—Habitual Cigarette Smoking Is Injurious to Health" and Section 5(c)(2) banned advertising tending to make smoking attractive to children. Thus, the Neuberger bill in substance followed the proposed FTC approach which would have required a health warning in cigarette adver-

* The broad scope of the inquiry was reflected in the opening words of Senator Magnuson, Chairman of the Committee:

"The committee opens hearings this morning on a question which is of great concern to many millions of Americans: What must be done to assure that all Americans are adequately informed of the hazards of smoking." Hearings Before the Senate Committee on Commerce on S. 559 and S. 547, 89th Congress, First Session, Part I (1965) at 1 (hereinafter Senate Hearings).

tisements. Such a health warning requirement, policed and supplemented by the FTC, was conceived of as a complete solution to the cigarette advertising problem.

The FCC itself acted in clear recognition of the comprehensive nature of the FTC program, as later incorporated in the Neuberger bill, and it is obvious that it considered such a program satisfactory. In its comments on S. 559 and S. 547 the FCC reiterated its previously formulated policy that it favored:

“* * * across-the-board treatment of the matter of regulating cigarette advertising and that since the FTC had undertaken a comprehensive remedial regulatory plan, the F.C.C. had not held proceedings or undertaken studies to evaluate the various factors and considerations in this area.” 9 F.C.C. 2d at 936.

Congress proceeded to enact for a three year trial period a comprehensive program on the subject of the relationship of smoking and health. That the program enacted was less restrictive than the one proposed by the FTC, or than the scheme which the FCC might now favor, does not alter the Congressional intent to make the legislation which it adopted a comprehensive scheme for dealing with this problem.

While the FCC does not directly dispute the comprehensiveness of the Congressional program, it attempts to justify its own action as a means of implementing the educational aspects of the program and of effectuating what it believes to be the intent of Congress. This reasoning is unsound.

In *Campbell v. Hussey*, 368 U.S. 297 (1961), the Court was called upon to determine the extent to which the Federal Tobacco Inspection Act, which provided uniform standards of classification and inspection of tobacco, had preempted the field. A Georgia statute which had imposed certain additional methods of tobacco classification, was challenged as unconstitutional on the ground that it fell within the preempted field. In upholding the challenge, the Court did not agree with Georgia that the statute could be saved as merely implementing the federal scheme:

"We have then a case where the federal law excludes local regulation, even though the latter does no more than supplement the former. Under the definition of types or grades of tobacco and the labeling which the Federal Government has adopted, complementary state regulation is as fatal as state regulations which conflict with the federal scheme". At 301-302.

It is interesting to note that Justice Black, in his dissent, argued in vain that since the Federal Act had as its basic purpose to assure the availability of as much information as possible, the Georgia law should be upheld as designed to effectuate the same purpose and as being in complete harmony with the Act. To the same effect are *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218 (1947) and *Missouri Pacific v. Porter*, 273 U. S. 341 (1927).

In the words of Justice Holmes, in *Charleston & Western Carolina R. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 604 (1915):

"When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go further than Congress has seen fit to go."

While these cases involve state statutes, they are equally applicable to a Federal agency which seeks to act in an area already occupied by a comprehensive Congressional program in which it is given no part to play.

Consequently, the FCC position that it is merely implementing the Cigarette Act or is effectuating its purpose and, therefore, has not entered the preempted field is unsound. The Cigarette Act has left no room for other Federal agency regulation in the same field.

(B) The FCC Ruling Is in Conflict With the Intent of Congress as Reflected in the Specific Language of the Act and its Legislative History

The manifest intent of Congress to maintain the regulatory status quo, supplemented only by the specific labeling

requirement of the Cigarette Act, is made explicit by the specific language of Section 5.

Under the general heading of "Preemption", Section 5 provides, *inter alia*, that:

"(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes, the packages of which are labeled in conformity with the provisions of this Act."

Subsection (b) did not originally appear in S. 559 nor in S. 547. It was added by the Senate Commerce Committee under circumstances clearly showing an intent to give to the existing voluntary controls, the educational campaigns of the Department of Health, Education and Welfare and the labeling requirement a fair chance to prove their effectiveness before deciding what new legislation might be necessary. In the words of the report of the Committee:

"Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package which will be required under the provisions of this bill, it was the committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking." S. Rep. No. 195, 89th Cong., 1st Sess. at 5 (1965).

While Congress was particularly aware of the proposed FTC rules requiring health warnings to be included in the text of cigarette advertisements and wanted to supersede them, this was not the sole reason for the intended preemption. The Senate Commerce Committee in fact rejected a recommendation by Senator Neuberger to make 5(b) applicable only to the FTC and thus leave the way open for other authorities to regulate cigarette advertising because of the health hazard. S. Rep. No. 195, 89th Cong., 1st Sess. at 32 (1965). Representative Moss opposed the inclusion of the

preemption language in the Cigarette Act on the theory that it would unduly insulate the cigarette industry from regulation. H. R. Rep. No. 449, 89th Cong., 1st Sess., at 7-8 (1965). Congress, however, rejected these views and adopted a broad preemption designed to allow time to assess the effects of the programs which it specifically authorized.

It is of particular significance that the Senate Commerce Committee, which had jurisdiction over the cigarette legislation and is also the Senate Committee most directly concerned with FCC matters, was operating on the assumption that the opponents of smoking could present their views on radio and television on the public service time voluntarily made available by the station but that the stations were not obligated to offer such time to them:

[Senator Magnuson] "What I am thinking about is, do you have, say, radio and television stations have a certain amount of public service time. Do you utilize that at all or would you plan to?"

[Surgeon General] "I do not believe that we have utilized this and I know of no specific plans to do this."

[Senator Magnuson] "Of course it will be up to the individual licensees to take it or not take it."

[Surgeon General] "That is right, sir. I think you must appreciate, Mr. Chairman, that there are quite a few other organizations who are vitally concerned about this problem and will be testifying before your committee that may very well propose this and, as a matter of fact, it is conceivable that the Interagency Council could wish to sponsor such public service advertising."

[Senator Magnuson] "Of course, when you issue a report that has some news value, they give it full coverage, as they did this report, in many, many ways." Senate Hearings at 40-41.

The FCC attempts to avoid the preemption which Congress clearly intended, by its tenuous distinction between statements "*in the advertising*" of cigarettes and statements "*because of the advertising*" of cigarettes. This distinction is little more than an exercise in semantics.

Not only does it disregard the comprehensive nature of the program adopted by the Cigarette Act and the wait-and-see intent of Congress, but it rests on an arbitrary interpretation of the word "advertising" in Section 5(b) to mean "advertisements" while ignoring the general import language in Section 10 of the Act which refers to the "termination of the provisions which *affect the regulation of advertising*" on July 1, 1969. (Emphasis added.)

Furthermore, the restrictive interpretation of Section 5(b) cannot easily be reconciled with the concession by the FCC that Congress has precluded until July 1, 1969 all action to ban or substantially curtail cigarette advertising. According to the FCC, applying the "fairness doctrine" to require "equal time" for anti-smoking statements would result in substantial curtailment of cigarette advertisements and is preempted, whereas requiring "significant time" is not preempted. The narrow path then left open to the FCC, according to its own analysis, is "insubstantial" or "mild" action which is taken by reason of, but does not affect the text of, cigarette advertisements. It is very doubtful that Congress would have intended the scope of its preemption to depend on whether the action taken was "drastic" and "substantial" or "mild" and "insubstantial", as determined by the agency taking the action.

The FCC's failure to appreciate and give effect to the preemption which Congress clearly intended is traceable in part to a misconception of the Congressional purpose in adopting the Cigarette Act. It is plain that Congress did not adopt that Act as an anti-smoking statute, but rather as a compromise interim measure balancing the competing considerations presented to it and drafted in the light of the limited and conflicting information available to it at that time.

The Neuberger bill, S. 547, would have included a finding of fact in the following language:

"Section 2. The Congress hereby finds and declares that the unrestricted promotion and advertising of cigarettes in interstate commerce, in the light of the conclusive evidence that cigarette smoking is injuri-

ous to health, constitutes a grave threat to the public welfare."

This Section was purposefully omitted in the Act as finally adopted. Instead, Section 2(2) of the Act included a specific recognition of the necessity to protect "commerce and the national economy . . . to the maximum extent consistent" with the declared policy of Congress to establish a comprehensive federal program, and to avoid "diverse nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health."

The FCC admits that:

"... Congress in enacting the Cigarette Labeling Act was concerned about possible economic impact on the tobacco and broadcasting industries, as well as the potential hazard to the public. * * *

"The compromise evolved by Congress was to require a health warning in labeling but not in advertising, for an interim period pending a further Congressional determination as to whether extensive smoking education campaigns and industry self-discipline would render such a drastic step unnecessary." 9 F.C.C. 2d at 931.

Congress deliberately declared a three-year moratorium on new weapons against cigarette advertising for two reasons: First, in view of the conflicting evidence as to the nature and extent of the relationship between smoking and health, Congress decided to wait until further research and study was conducted in this field. For this purpose, Section 5(d)(1) of the Cigarette Act specifically directed the Secretary of Health, Education and Welfare (hereinafter "HEW") to transmit within eighteen months (and annually thereafter) a report to Congress concerning current information on the health consequences of smoking. Second, Congress wanted to evaluate the effectiveness of the existing controls and the newly-adopted compulsory warning on the package, before deciding on new legislation. In this connection, the FTC was required by Section 5(d)(2)

of the Cigarette Act, to transmit within eighteen months (and annually thereafter), a report to Congress concerning the effectiveness of cigarette labeling, and current practices and methods of cigarette advertising and promotion.

The controls and regulations in existence during the moratorium period, the impact of which Congress wished to weigh and evaluate, are by no means inconsiderable. In addition to the new labeling requirement, the Cigarette Advertising Code imposes important restrictions. That Code, which is enforced by an independent Administrator, mandates, in effect, that no representations with respect to health be made in cigarette advertising (Section 2). Further, the Code restricts considerably any implications of health, distinction, success or attraction resulting from smoking and specifically prohibits depicting athletes as smokers (see, *e.g.*, Section 1, subparagraphs (d), (f), (h), (i) and (j)). In addition, there are many provisions in the Code insuring that cigarette advertising will not be presented in a manner appealing to the young.

The FTC retains, under Section 5(c) of the Cigarette Act, its authority to take action against unfair or deceptive practices in the advertising of cigarettes. Not only is the FTC position such that it is not to be doubted that any health representation, however implicit, in cigarette advertising would be attacked by the FTC, but the Senate Commerce Committee has plainly stated in its Report that:

“The committee firmly believes that the Federal Trade Commission should regard as an unfair or deceptive act or practice within the meaning of section 5 of the Federal Trade Commission Act any advertising which tends to negate the warning which must be placed on the package in accordance with the bill.” S. Rep. No. 195, 89th Cong., 1st Sess. at 6 (1965).

Both the HEW and the FTC initial reports presented to Congress in the summer of 1967 recommended that a health warning be required in cigarette advertisements. Certain Congressmen have introduced bills adopting the same ap-

proach.* The Senate Commerce Committee commenced a new round of extensive hearings, and witnesses testified on the question of the relationship between smoking and health and what remedial action, if any, is required.

The FCC should not be permitted to anticipate Congressional action. If Congress eventually adopts the proposed or similar bills to require health warnings in cigarette advertisements, the contested ruling of the FCC would lose all significance. If the bills are rejected this would mean that Congress finds that no new measures against cigarette advertising should be taken by reason of the health issue. In either case, the FCC ruling would most likely fall within a new field of Congressional preemption.

The FCC does not contend that cigarette advertisements have been representing anything more than that smoking is attractive and enjoyable. Nor does it contend that, since the adoption of the Cigarette Act, cigarette advertisements have become more aggressive or more effective than before. Rather, on the basis of essentially the same data that was available to Congress at the time of the hearings, and without any investigation or study of its own, the FCC has chosen to act where Congress wanted no action; it has concluded that existing controls are inadequate when Congress wanted to allow them a three-year trial period; and it has dealt a blow to cigarette advertising when Congress was mindful of the effect on commerce and the national economy that any substantial interference could have.

Smoking may be a health hazard. Cigarette advertising may present smoking as a pleasurable activity. But this does not automatically establish authority in an administrative agency, such as the FCC, to take remedial action. As

* For example, Senator Robert Kennedy has introduced two bills on the subject: (a) S.2394 which would require a health warning in cigarette advertisements, subject to FTC regulation, and (b) S.2395 which would authorize the FCC to determine the time periods and type of programs within those periods on which cigarette advertising could be broadcast and the overall volume of cigarette advertisements.

FCC Commissioner Loevinger stated in his concurring opinion:

"... a burning conviction of good to be achieved or harm to be avoided neither establishes jurisdiction in a regulatory agency nor provides a sound legal guide to action." 9 F.C.C. 2d at 953.

II.

The FCC's Application of the Fairness Doctrine to Cigarette Advertising Is Arbitrary and Capricious and An Abuse of Discretion.

(A) Cigarette Advertising Does Not Raise a Controversial Issue of Public Importance

The most obvious defect in the FCC's extension of the "fairness doctrine" to cigarette advertising is the fact that the advertising itself does not embody anything which raises a controversial issue of public importance.

No cigarette advertising makes any claim with respect to health. Such claims are forbidden by the manufacturers' own advertising code and the FTC Cigarette Advertising Guides. Congress has suggested that it would be a deceptive and unfair trade practice for the advertiser to state that cigarettes were healthful or harmless.* Instead the advertising, to the extent that it contains any reference to the qualities and characteristics of cigarettes, refers to taste, coolness, enjoyment and other qualities that might distinguish one cigarette from another. For example, the latest current jingle states that a "101" is "a silly millimeter longer" than its competition, and the entire text of another widely used commercial, which was one of the three

* "The committee firmly believes that the Federal Trade Commission should regard as an unfair or deceptive act or practice within the meaning of section 5 of the Federal Trade Commission Act any advertising which affirmatively represents that smoking promotes good health or which affirmatively represents that smoking is not a hazard to health." H. R. Rep. No. 449, 89th Cong. 1st Sess. at 5 (1965).

complained of in this case, is as follows: "Come to where the flavor is—Come to Marlboro Country." (R. 416)

What physiological effect smoking has and to what extent it is harmful to health is undoubtedly controversial and of interest to the public. That issue is not, however, raised by the advertisements in question. Indeed, since the Commission first made its ruling without even having before it the text of the commercials which triggered the complaint, it apparently takes the view that there is nothing which a tobacco manufacturer might say in attempting to sell cigarettes which would not raise the controversial issue which it found here.

The only issue raised by a claim that a particular cigarette is more enjoyable than others is the question whether it actually is more enjoyable. This is not a controversial issue of public importance as to which the expression of competing views should be compelled.* It is unreasonable to hold, as the Commission did, that the other side of the issue whether a particular cigarette is enjoyable is the question whether smoking is harmful to health. By so holding the Commission compels broadcasters to give time to one side of the health issue where the other side has not been expressed by cigarette advertisers, and probably cannot be. It is evident that the Commission's ruling represents, not a logical consequence of the "fairness doctrine", but the use of that doctrine as a device to compel the expression of views which the Commission thinks should be heard.

The arbitrariness of the FCC's ruling in this case is highlighted by a comparison with its decision in *Mrs. Madalyn Murray*, 5 R.R. 2d 263 (1965), where it specifically refused to find a controversial issue of public importance in

* The FTC Cigarette Advertising Guides, CCH Trade Reg. Rep. ¶7894 (FTC Release, Sept. 22, 1955), expressly permit representations, claims and illustrations of "enjoyment" of cigarettes. They state:

"(a) Nothing contained in these guides is intended to prohibit the use of any representation, claim or illustration relating solely to taste, flavor, aroma, or *enjoyment*." Emphasis added.

religious broadcasts and held that the "fairness doctrine" was not applicable to them. In that case, the Commission was asked by a representative of "freethought," which was described as "the total antithesis of religion," to require certain named stations which had carried religious programs to carry "freethought" programs on the issue of "the confrontation of religion and freethought."

A concurring opinion in that case by Chairman Henry in which Commissioner Cox joined, recognized that the "fairness doctrine" applied to controversial issues raised in religious programming, but pointed out that religious programming without more did not raise a controversial issue of public importance. Chairman Henry said:

"The matter comes before us simply in the context of the presentation of 'church services, devotionals, prayer.' The Commission has long held that mere carrying of a religious broadcast does not, in and of itself, mean that one side of a 'controversial issue of public importance' was presented. See, e.g., Letter of Edward J. Heffron, 3 Pike & Fischer RR 264a (1948); Letter to Robert H. Scott, 25 Pike & Fischer RR 349 (1962). The contrary position urged in effect by complainant—that every devotional service, per se, is presentation by the licensee of a viewpoint on a controversial issue—is, I think, patently unreasonable." At 266-67.

This language is clearly applicable to this case. The position now urged in effect by the Commission that every cigarette advertisement, per se, is a presentation of a controversial issue of public importance, is in Chairman Henry's words "*patently unreasonable*."

(B) The Commission Has Substituted Its Judgment for the Judgment of Its Licensees

A second difficulty in this application of the "fairness doctrine" is that the Commission, rather than holding the licensee to a standard of reasonableness in his handling of competing demands for time, substitutes its own judgment for that of the licensee. This is a radical and arbitrary

departure from the Commission's prior practice. Thus, the Commission had previously enunciated the doctrine as follows:

"[T]he licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to *whether a controversial issue of public importance is involved*, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming. See paragraph 9, EDITORIALIZING REPORT. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, *but rather to determine whether the licensee can be said to have acted reasonably and in good faith*. There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the 'equal opportunities' requirement." *Fairness Primer*, Commission Public Notice 64-611, 2 R.R. 2d 1901 at 1904 (1964). (Emphasis added.)

See also Commission Letter to Honorable Oren Harris, FCC Public Notice 63-851, adopted September 18, 1963, and dated September 20, 1963, and particularly pages 4 and 5; *Capitol Broadcasting Co., Inc.*, 2 R.R. 2d 1104, 1109 (1964).

Similarly, in its REPORT ON EDITORIALIZING the Commission had defined the licensee's responsibility under the "fairness doctrine" as follows:

"... the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to *whether a controversial issue of public importance is involved*, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming. . . . In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, *but rather to determine whether the licensee can be said to have acted*

reasonably and in good faith." 29 Fed. Reg. at 10416. (Emphasis added.)

Applying these principles, as stated by the Commission, to cigarette advertising one would have thought that the relevant questions were *whether the licensee acted reasonably and in good faith* in determining that particular advertisements did not involve a controversial issue of public importance and, if such an issue was presented, *whether the licensee acted reasonably and in good faith* in determining that, in the light of the general treatment he had given the issue on his station, no further broadcast of responsive material was necessary. Rather than approaching the question in this fashion, however, the Commission determined that, *in its own judgment* any cigarette advertising, whatever its content, expresses a point of view on the health question even though health is not mentioned, and the broadcast of any such advertisement requires the broadcasting of responsive material *on a weekly basis*.*

The extent of the Commission's substitution of its own judgment for that of its licensees is clearly illustrated by the candid remarks of Commissioner Loevinger in the closing paragraph of his concurring opinion.

"... I am reluctant to concur because this ruling seems to be the result of sentiment rather than conviction. It is based on a strong feeling that the public, especially the younger members of the public, should be protected against enticement to smoke cigarettes, rather than upon a well reasoned conclusion that this is an effective means of achieving that objective and that this ruling is soundly based on legal authority. My opinion cannot change the result, so all I can do is indicate the difficulties I see in this approach to the subject and the reasons that I have doubts, while confessing candidly that I put doubts aside and join, albeit reluctantly, in voting for the ruling here because of a strong feeling that suggesting cigarette smoking to young people, in the

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light of present knowledge, is something very close to wickedness." 9 F.C.C. 2d at 956.

(C) Limitation of the Commission's Ruling to Cigarette Advertising is also Arbitrary

There is a further arbitrariness in the Commission's limitation of its ruling to cigarette advertising. If advertising which encourages the purchase of particular products in and of itself raises whatever issues may relate to that product's purchase or use, one can imagine a multitude of advertising situations to which the Commission's doctrine, if consistently employed, might have application. Among the examples which spring to mind are the following:

- (1) May those who think shoulder safety straps desirable reply to advertisements of automobiles which do not have them?
- (2) May those who think shoulder safety straps unsafe reply to advertisements of automobiles which do have them?
- (3) May those who think that caffeine is harmful to health reply to coffee advertisements?
- (4) May those who believe that excessive cholesterol is a serious health hazard reply to the advertising of products which promote its formation?
- (5) May those concerned with water pollution reply to the advertisements of companies whose manufacturing techniques produce such pollution?

In each of these cases one might argue, by analogy to what the Commission has said here, that the advertising of the product portrays its use as pleasant and enjoyable, without pointing out its alleged hazards or socially undesirable by-products of its manufacture and use.

The Commission's ruling is, on analysis, more dictated by its own view of what should be published and what should not than it is by any concept of "fairness", even if the dispensing of fairness were a part of its constitutional and statutory business. It is submitted that so rigid and arbitrary a dictation of what its licensees must broadcast is a clear abuse by the Commission of its authority.

III.

**The Commission's Action Is Beyond the Authority
Conferred on It by the Communications Act.**

Even if the Commission's ruling is not precluded by the Cigarette Act, the question remains whether the "fairness doctrine," and this particular application of it, are authorized by anything in the Communications Act.

Nothing in the Communications Act specifically authorizes the Commission to regulate fairness in broadcasting or, indeed, any other aspect of programming or program content. The basic authorization on which the Commission has relied is the statutory provision authorizing the Commission to take account of the "public interest, convenience, and necessity" in granting and denying licenses. 47 U.S.C. §309(a). Such a nebulous standard, while adequate to confer regulatory authority in many areas, cannot provide a sufficient authorization for the regulation of the content of what is published by the press, or any part of it, with respect to controversial issues. With respect to the regulation of constitutionally protected rights of this sort this Court has consistently held that only a very explicit Congressional authorization will suffice.

Directly in point is the case of *Hannegan v. Esquire, Inc.*, 327 U. S. 146 (1946). There, the Postmaster General withheld a second-class mailing permit from Esquire magazine, since in his opinion material published in the magazine was not in the public interest. The Court struck down such action, holding that Congress had granted no such censorial power to the Postmaster General in general language prescribing the conditions for the granting of a second-class permit. Cf. *Milwaukee Pub. Co. v. Burleson*, 255 U. S. 407, 437 (1921) (Holmes, J., dissenting). To imply a wide-ranging authority to compel or prevent the expression of particular views by broadcasters from the bare authority to issue licenses in the public interest goes far beyond what the Postmaster General attempted in the *Hannegan* case.

See also *Kent v. Dulles*, 357 U. S. 116 (1958); *Greene v. McElroy*, 360 U. S. 474 (1959).

Nor can the Commission's position be buttressed by the 1959 amendment to Section 315(a), upon which it relies:

"Nothing in the foregoing sentence shall be construed as relieving broadcasters . . . from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. §315(a).

At the outset, it is significant that the quoted language did not purport to be an express delegation to the Commission of any affirmative authority. It would be unusual to derive a far-reaching authority to regulate the content of broadcasting from language designed only to prevent an implied repeal.

The reason for the 1959 Congressional action was the much publicized *Lar Daly* case, *supra*, p. 8 which Congress felt unduly restricted broadcasters. The amendment was intended to relax the FCC restriction announced in *Lar Daly*, and the language now relied on by the FCC was merely "a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934." H. R. Rep. No. 1609, Conference Report, 1959 U. S. Code Cong. & Admin. News 2582, 2584 (Aug. 27, 1959). Thus it was not designed to expand or increase any power of the Commission beyond the authority conferred by the Communications Act.

To find a power in the Commission to adopt and apply its policy with respect to cigarette advertising is also plainly inconsistent with Section 326 of the Communications Act, 47 U.S.C. §326, which provides that:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

That the present policy imposes "censorship" is plain. The effect of the ruling is to require licensees to broadcast specific material, *i.e.*, material alleging that cigarette smoking is a hazard to health. As Professor Chafee has noted, one of the things which is clearly included within the concept of "censorship" is "dictation as to what should go into particular programs." Z. Chafee, *Government and Mass Communications* at 39 (1965). Indeed, the Commission has itself recognized that Section 326 precludes it from prescribing program content. Thus, in *Washington Women's Strike for Peace*, 6 R.R. 2d 307 (1965) the Commission, after quoting Section 326, said:

"Thus, the Act makes it clear that the Commission has no power to require a broadcaster to carry or refrain from carrying any particular program, or to prescribe the content of any program presented over the air. Moreover, Section 3(h) of the Act provides that '... a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.'" 6 R.R. 2d at 308. (Emphasis added.)

See also *Paul M. Butler*, 19 R.R. 991, 992 (1960).

In short, the Commission can point to no language in the Communications Act which grants it the authority to follow the policy with respect to cigarette advertising which it has applied in this case.

Even if it were found that Congress intended to confer on the Commission power to pursue a policy of this sort, that power was not conferred with sufficient explicitness to withstand a constitutional challenge. Whatever Congress intended, there is no standard contained either in the original Communications Act or in the amendment to Section 315 upon which the Commission relies, precise enough to provide a basis for administrative regulation of speech or of the press.

The Supreme Court has repeatedly held that the Constitution prohibits:

"... the exaction [by the Government] of obedience to a rule or standard that is so vague and indefinite

as to be really no rule or standard at all." *Baggett v. Bullitt*, 377 U. S. 360, 374 (1964).

It is familiar Constitutional doctrine that "... stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S. 147, 151 (1959); *NAACP v. Button*, 371 U.S. 415, 432 (1963); *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 532 (1952) (concurring opinion of Frankfurter, J.). In many cases the Court has invalidated for vagueness statutes purporting to authorize licensing or censorship. *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870 (1955); *Winters v. New York*, 333 U. S. 507, 514 (1948); *Gelling v. Texas*, 343 U. S. 960 (1952).

It is evident that the "public interest" standard from which the Commission derives its basic regulatory authority is far vaguer than the statutes which the Supreme Court has repeatedly struck down and that, indeed, even the language of the 1959 amendment to Section 315 provides too nebulous a guide to meet the strict requirement with respect to statutory regulation of speech and the press.

IV.

The Commission's "Fairness Doctrine" as Applied in This Case Violates the First Amendment.

No part of the Commission's policy with respect to any aspect of its "fairness doctrine" has ever been held by the Supreme Court to be a proper exercise by the Commission of its responsibilities with respect to the regulation of broadcasting.

In *NBC v. United States*, 319 U. S. 190, 226 (1943), the Court, in upholding the constitutionality of the Communications Act, was careful to point out that Congress had not authorized the FCC to choose among applicants on the basis of "their political, economic or social views...."

In *FCC v. Sanders Bros. Radio Station*, 309 U. S. 470, 475 (1940), the Court commented that:

“The Commission is given *no supervisory control of the programs*, of business management or of policy.”
Emphasis added.

In that same case the Court made it clear that broadcasters “are not common carriers and are not to be dealt with as such.” (309 U. S. at 474).*

Although this Court in *Red Lion Broadcasting Co. v. FCC*, — App. D. C. — 381 F. 2d 908 (1967) held that the “personal attack” aspect of the “fairness doctrine” did not violate the First Amendment, the Supreme Court has granted certiorari. Pursuant to an order of the Supreme Court the *Red Lion* case will be argued there after a decision by the Court of Appeals for the Seventh Circuit in a case involving the “personal attack” and “political editorializing” rules adopted by the FCC as an extension of the “fairness doctrine”.

This Court is being asked to consider here the constitutionality of an aspect of the “fairness doctrine” which has not previously been before it. We have considered above the manner in which the Commission’s present ruling deviates from, and distorts, its prior statements and application of the “fairness doctrine”. The doctrine, in its essential purpose and effect, raises a serious constitutional question. We turn to this constitutional issue.

(A) The Impact of the Commission’s Fairness Doctrine Policies

There can be no doubt that the Commission’s “fairness doctrine” policies have inhibited and limited free expression by broadcasters, and that, if the Commission’s policies continue in the direction in which they have been developing, inhibition and limitation will increase.

* This stands in sharp contrast to the legislative position considered by Congress in the development of the Radio Act of 1927, but not adopted, which would have provided that the licensee “shall be deemed a common carrier in interstate commerce” with respect to broadcasts by candidates or broadcasts of discussions of “any question affecting the public.” (See pp. 4-5, *supra*).

The precise impact of the Commission's rulings and its statements of policy on what is broadcast cannot, of course, be measured, and can never be measured, since we can never know for any period of time what would have been broadcast had the Commission's policy been other than it is. The distribution of programming among program categories, the content of particular programming, and the extent and nature of broadcasting on controversial issues are the results of the interaction of a multitude of social, economic, political and legal forces, only one element of which is the Commission's "fairness doctrine".

It has never been thought necessary, however, in cases where governmental action threatens to impinge upon free expression, to analyze nicely the precise quantum of suppression produced by the particular governmental practice or policy complained of. Thus, in *Lamont v. Postmaster General*, 381 U. S. 301 (1965) the Court did not find it necessary to determine just how much communist mail would remain undelivered as a result of the requirement that a reply card be returned in order to secure delivery, and in *Mills v. Alabama*, 384 U. S. 214 (1966) the Court found it unnecessary to analyze precisely how much political debate would be restrained by a statute prohibiting the publication on election day of editorials relating to the issues or candidates in the election. In the latter case it was evident that the impact would be small since the statute in no way impaired debate up to and including the very eve of the election.

The inquiry has always been merely whether, as a matter of logic and common experience, a particular governmental restriction is likely to limit or regulate free expression in some degree. Freedom of speech and of the press are, in the Supreme Court's words, "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. Little Rock*, 361 U. S. 516, 523 (1960).

It is evident that the pursuit by the Commission of the policy exemplified by its fairness doctrine rulings has an impact on free expression far greater than that which the Supreme Court has found to be constitutionally impermis-

sible in other cases. The impact of the doctrine takes several forms:

1. *Broadcasters are discouraged from presenting programming which may necessitate the allowance of time to spokesmen for other points of view.**

The dampening effect of recent Commission policy on broadcasters' attention to public issues has been recognized by a recent commentator after a careful study (McMillin, *New Voices in a Democracy*, 3 TELEVISION QUARTERLY 27, 41-8 (1964)), and by members of Congress. Thus Mr. McMillin quotes a letter from Representative Oren Harris, then Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, asking rhetorically "Will not broadcasters want to avoid starting an interminable chain of argument and debate?" (*Id.* at 48). A criticism which has been made of broadcasters over the years is that their programming is too even-handed and neutral and that there is too great a reluctance to take positions. See, e.g. *The Nation*, January 23, 1967, pp. 99, 100; *The New York Times*, July 30, 1966, p. 53; *Variety*, November 30, 1966, p. 24. The Commission's policy is a strong force working toward such a result.

2. *The policy requires broadcasters themselves to impose rigorous censorship on those who use their facilities.* Since the broadcaster is accountable, not only for his own use of his facilities to state positions, but for all material broadcast, he must carefully control what is uttered by those who appear on his station in order to insure that their utterances will not expose him to the penalties of the "fairness doctrine". Spontaneous discussion of a public issue involves particular risks.

3. *The policy, to the extent to which it is successful in securing its objective, insures a bland impartiality in the*

* That the equal time provision of Section 315 has had such an effect was acknowledged by the Senate Committee on Interstate and Foreign Commerce in its Report favoring a joint resolution to suspend that provision during the 1960 Presidential campaign (S. Rep. No. 1539, 86th Cong., 2d Sess. (1960)) and by Congress in enacting the suspension (Act of Aug. 24, 1960, P. L. 86-677, 74 Stat. 554).

presentation of views on public issues. Expression of any particular point of view is muffled by being incorporated in a total context which gives substantial voice to every view.

The "fairness doctrine" tends to distort priorities with respect to what is broadcast. Even the Commission must admit that it cannot weigh the relative worth or importance of different points of view on an issue and compel licensees to mete out time in accordance with such an evaluation. Yet it is surely true that the public interest is not served by allotting substantial amounts of time on the airwaves to every point of view. So long as the Commission does not weigh the relative worth of competing views its policy must tend toward that result. There is still an advantage in a free marketplace of ideas, where ideas must compete to be heard, as against a government-controlled marketplace of ideas, where the government determines what will be heard.

4. *The policy places in the hands of the FCC the power to affect in more subtle ways the content of what is broadcast by its licensees.* The Commission has frequently recognized in discussing the requirements of "fairness" the complexity and subtlety of the judgments which must be made in this area. Thus, in its 1949 REPORT ON EDITORIALIZING the Commission emphasized that the requirements of "fairness" might differ in different contexts and that in responding to specific requests for time the licensee would be required to weigh and balance a multitude of factors. In the hands of a Commission which chose to exercise it to promote or suppress particular points of view, the power to apply a policy of such uncertain meaning could be a weapon of considerable force.

Commissioner Loevinger's dissenting opinion in *Mrs. Madalyn Murray*, 5 R.R. 2d 263 (1965), indicates that this problem is by no means hypothetical. In that case the Commission was requested, pursuant to the "fairness doctrine," to direct 15 radio stations in Hawaii to afford broadcast time for the discussion of atheism. In contrasting the opinions in that case with the opinions in *Brandywine-Main Line Radio, Inc. (WXUR)*, 4 R. R. 2d 697 (1965), Commissioner Loevinger said:

“The contrasting opinions in that case and this one suggest that the fairness doctrine applies only when viewpoints acceptable to the Commission are denied the opportunity for presentation.” 5 R.R. 2d at 269.

In an industry as sensitive to the real or imagined attitudes and requirements of the regulatory agency as broadcasting is, the Commission's policy brings powerful influences to bear on the selection and emphasis of political, social and economic views by broadcasters. Thus, one commentator saw in the Commission's specific reference in its 1963 Public Notice to the “segregation—civil rights controversy” a suggestion that “the FCC was less interested in principle than in furthering administration policy.” McMillin, *supra* at 38. That same writer quoted a “prominent attorney” as expressing the view “as a practical matter,” that “a broadcaster is going to get into trouble if he expresses any editorial viewpoint which is displeasing to the Administration.” (*Id.* at 45). The important thing is not whether such statements accurately reflect the FCC's policy, but whether there is sufficient reason for broadcasters to believe that they do to influence their judgments. As long as the Commission is embarked on a day-by-day and program-by-program regulation of public issue broadcasting, it is difficult to dispel such fears.

Nor can the present ruling be justified as a regulation of commercial or promotional speech.* If the Commission were regulating the content of the advertising itself it would presumably concede that it fell within the scope of the preemption of the Cigarette Act. The Commission does not purport to regulate advertising, *qua* advertising, but rather purports to regulate the expression of views. Rather than regulating the content of the advertising, it is using the carrying of the advertising as a lever to compel the expression of particular views on a subject which the Commission believes to be controversial and of interest to the public. Moreover, the subject as to which the Commission is compelling expression, *i.e.*, the effect of cigarette smok-

* Cf. *Valentine v. Chrestensen*. 316 U. S. 52, 54 (1942).

ing on health, is one not dealt with in the advertising which gave rise to the Commission's ruling.

A compulsion of particular expression is as much of an encroachment on free expression as is the suppression of particular views. As has been noted, Professor Chafee has pointed out that one of the things which is most clearly included within the concept of a censorship is "dictation as to what should go into particular programs." CHAFEE, *op. cit.* at 641.

The Commission's indication in the ruling under attack that it is making a selective determination that cigarette advertising, and no other, raises an issue requiring that reply time be given, emphasizes the capacity for censorship which is implicit in the ruling. As has been noted above (p. 30), the advertising of many other products might give rise to demands for reply time. In an industry based upon advertising as its source of revenue, and in which thousands of products are advertised, the power of the Commission to use advertising as a vehicle to compel the expression of views on selected subjects will be considerable. Such a wide-ranging power to compel the broadcasting of views which the Commission favors poses a threat of censorship which, in some of its dimensions, goes beyond the personal attack ruling considered by this Court in the *Red Lion* case.

It is evident that, when measured against the criteria which the Supreme Court has consistently applied in determining whether free expression or the rights of the press have been improperly restrained, the Commission's "fairness doctrine" as here applied goes far beyond the constitutionally permissible limit. Indeed, this is so clearly true that one is impelled to inquire how it is that the Commission has moved so far down this avenue of regulation.

We submit that the Commission's defense of its policy rests on two basic misconceptions, and that it is these misconceptions that have led to the development of its present unconstitutional policy. The misconceptions are:

1. That there is a constitutionally significant difference between printed journalism and electronic journalism which deprives the latter of First Amend-

ment protections which have always been accorded the former.

2. That the First Amendment under certain circumstances supports governmental regulation of the press directed at securing access to the press for persons, groups, or points of view.

We will consider each of these misconceptions in turn.

(B) There is No Constitutionally Significant Difference between Broadcasting and the Printed Press

The Supreme Court has frequently made it clear that radio, motion pictures and television enjoy the constitutional protection afforded the "press" by the First Amendment. See, e.g., *Lovell v. Griffin*, 303 U.S. 444, 452 (1938): "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." And in *United States v. Paramount Pictures*, 334 U.S. 131 (1948) the Court said:

"We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." (334 U. S. at 166) (Emphasis added).*

The necessity for such a rule is evident. The tremendous growth in the broadcasting media in the last forty-five years has been marked by a tendency for broadcasting to displace the traditional printed media as the public's primary source of news and information. According to a recent survey, more people in this country in 1967 relied primarily on television as a source for news than relied on any other medium. If television and radio are taken together, the reliance on broadcasting was far greater than the reliance on all other media combined. Moreover, the study showed a trend toward increasing reliance on broad-

* See also *Red Lion Broadcasting Co. v. FCC*, —App. D. C. —, 381 F. 2d 908, 923 (D. C. Cir. 1967); *Rumely v. United States*, 90 App. D. C. 382, 197 F. 2d 166, 177 (D. C. Cir. 1952), *aff'd*, 345 U. S. 41 (1953); *American Broadcasting Co. v. United States*, 110 F. Supp. 374, 389 (S. D. N. Y. 1953), *aff'd*, 347 U. S. 284 (1954).

casting.* Thus, to the extent that broadcasting is excluded from the scope of First Amendment protection, freedom of the press would be denied to what may now be, and is likely increasingly to become, the most important single segment of the "press."

While it is beyond dispute that broadcasting is a part of the "press" and is entitled to the protection of the First Amendment, it is sometimes suggested that there is some peculiarity of broadcasting which warrants greater encroachment on its independence than would be allowed with respect to other media. The major fact upon which the Commission has relied from the outset to justify the development of its "fairness doctrine" is the allegedly limited number of radio frequencies available for broadcasting and the fact that, if two near-by stations attempt to broadcast upon the same radio frequency at the same time, each transmission will interfere with the other so that neither may be heard. It is this problem of interference which alone makes necessary, and has been thought to justify, federal regulation of broadcasting—a point which the Commission conceded in the 1949 REPORT ON EDITORIALIZING, *supra*, when it said:

"Any regulation of radio, especially a system of limited licensees, is in a real sense an abridgement of the inherent freedom of persons to express them-

* Roper Research Associates, "Emerging Profiles of Television and Other Mass Media: Public Attitudes 1959-1967" at 7 (April 5, 1967). The relevant question posed by the researchers and the tabulated answers for each of five years were as follows:

"First, I'd like to ask you where you usually get most of your news about what's going on in the world today—from the newspapers or radio or television or magazines or talking to people or where?

	1959	1961	1963	1964	1967
Source of most news.....	%	%	%	%	%
Television	51	52	55	58	64
Newspapers	57	57	53	56	55
Radio	34	34	29	26	28
Magazines	8	9	6	8	7
People	4	5	4	5	4
Don't know or no answer.....	1	3	3	3	2

(Multiple answers accepted; column totals therefore exceed 100%.)"

selves by means of radio communications. *It is however, a necessary and constitutional abridgement in order to prevent chaotic interference from destroying the great potential of this medium for public enlightenment and entertainment.*" 13 F.C.C. at 1257 (1949). (Emphasis added.)

The conclusion, however, that the government, in addition to parcelling out the frequencies, should limit and control the "fairness" of what is broadcast could be justified, if at all, only on the basis that the facilities are so limited and their impact so unique that special limitations, not applicable to other forms of communication, are justified. Specifically, the question posed here is whether the scarcity and uniqueness of broadcasting facilities are such as to warrant the particular restrictions imposed by the FCC under the "fairness doctrine."*

In its 1949 REPORT ON EDITORIALIZING the Commission quoted from, and relied upon, its 1929 decision in *Great Lakes Broadcasting Company, supra*, in which it had referred to the limited room in the broadcast band for com-

* It should be noted that, at the time when the Constitution and the First Amendment were adopted, there were severe technological limitations on the production of newspapers in this country. All communications were extremely slow, and there was no regular postal service; hence news was a scarcity. Printing presses were few in number and were expensive; and the necessary metal type, and suitable inks and papers usually had to be imported from Europe at considerable expense. See S.N.D. NORTH, *THE HISTORY & PRESENT CONDITION OF THE NEWSPAPER & PERIODICAL PRESS OF THE UNITED STATES* (TENTH CENSUS OF THE UNITED STATES, Vol. 8 (1884)). Prior to the Revolution, the colonial government tightly restricted the number and content of the few newspapers which were published. It is estimated that in 1776, there were only 41 newspapers in all the Colonies, see NORTH, *supra*, at 27, and that there were only 43 at the close of the war. CHENERY, *FREEDOM OF THE PRESS* 142 (1955). With these factors of "scarcity" then present, there was far more occasion for concern that such facilities might be irresponsibly or unfairly used than exists today, with the varied means of communication now available, the multitude of voices which are constantly heard, and the cheap availability of printed material on almost every subject. Rather than feeling compelled by the scarcity of facilities to impose governmental controls to insure that they be well used, the men who wrote our Constitution framed the First Amendment prohibiting any law abridging the freedom of the press.

peting voices. Those words were written, however, at a time when the technology of radio did in fact severely limit the number of radio "channels" available for licensing. Nearly forty years have passed since that case was decided, and the increasingly sophisticated techniques of radio transmission and reception have exploded the fundamental assumption of the decision.

At first, only a limited number of frequencies were available, and all of these were on the AM band. The development of directional antennas materially increased the number of stations which could operate in a given locality without interference, H. WARNER, *RADIO & TELEVISION LAW* §23b, at 234-35 (1948). The invention during the thirties of the FM method of broadcasting and reception nearly doubled the number of radio channels technologically available for licensing and broadcasting to the public. FM made available an additional 2,000 to 3,000 stations, on a nationwide basis. (*Id.* §34 f. 12 at 402, §61 at 599). Within another 15 years, commercial television broadcasting on the very high frequency band (VHF) was a reality. With the advent of UHF television broadcasting in the late 1950's, the number of available channels has grown even more.

It is evident that a "scarcity" of channels of the kind which gave rise to the assumptions made by the Federal Radio Commission in 1929 is no longer with us, that in fact, there is today in broadcasting room for a multitude of voices.* The technological limitations of 1929, whatever their relevance, cannot be used to justify the exercise of a regulatory power over speech in 1967.

* This change in the technological foundation of the Commission's position has not gone unnoticed by the commentators. Thus, in *Note, Regulation of Program Content by the F.C.C.*, 77 HARV. L. REV. 701 (1964), the authors observed in another context:

"The demand that each station present a balanced selection of programs seems to have been more compelling in the early days of radio and television than in an age when listeners may choose among a large number of AM, FM, VHF and UHF broadcasts". At 705-06.

As has been shown, "scarcity" no longer exists in terms of absolute numbers of broadcasting facilities. It is equally true that scarcity no longer exists in comparison with the most nearly comparable medium of printed communication, i.e., the daily newspaper.*

In 1922, there were in the United States only 30 radio broadcasting stations in operation; whereas in the same year there were 2,033 English-language daily newspapers published in the United States.** However, the intervening years have seen a sharp reversal of these relative proportions. By 1965 the number of commercial broadcasting outlets in the United States had soared to a total of 5,681 stations (which includes 3,930 AM radio stations; 1,189 FM radio stations; and 562 TV stations, and excludes all educational radio and TV stations); however, the same period saw a steady but marked decline in the number of daily newspapers published, to 1,751.† There are thus, today, a great many more broadcasting stations serving the public than there are daily newspapers.††

Further, within any given locality, there are generally fewer daily newspapers published than there are broadcasting stations. A comparison of the relative numbers of

* The daily newspaper is the most nearly comparable to radio and television because it is upon these three media that the public relies for the continuous, day-to-day flow of news and information of a local, national and international nature.

** U. S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, 491, 500 (1961).

† U. S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 519, 523 (87th ed. 1966).

†† The most recent publication of statistical data by the FCC shows a continued increase in the number of broadcasting stations since 1965. On January 31, 1968, there were in the United States 4177 AM radio stations, 1788 FM radio stations, 331 FM non-commercial radio stations, 145 UHF commercial television stations, 504 VHF commercial television stations, 75 UHF non-commercial television stations and 72 VHF non-commercial television stations (FCC Public Notice-B No. 12,895 released on February 13, 1968).

each of these news media in some representative states is as follows:*

	Daily News- papers	Broad- casting Stations	AM	FM	TV
California.....	128	373	223	116	34
Florida.....	47	239	181	41	17
Illinois.....	83	197	118	59	20
Maine.....	9	43	32	5	6
Nebraska.....	19	64	41	10	13
New York.....	85	240	149	66	25
South Dakota.....	12	38	26	2	10

A similar situation is found to exist when comparable figures for the five largest metropolitan areas in the United States** are examined:

	1960 Population	Daily News- papers	Broad- casting Stations	AM	FM	TV
New York.....	10,694,632	21	79	35	35	9
Chicago.....	6,220,913	13	79	32	39	8
Los Angeles- Long Beach.....	6,038,771	21	76	32	35	9
Philadelphia.....	4,342,897	17	52	23	22	7
Detroit.....	3,762,360	5	41	12	23	6

An analysis of the situation in the New York Metropolitan Area is instructive.*** In that area there are 21 English-language daily newspapers,† compared to 9 television

* U. S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 519, 523 (87th ed. 1966).

** In each instance the area referred to is the appropriate Standard Metropolitan Statistical Area (SMSA) as defined by the Bureau of the Census. The figures are compiled from U. S. BUREAU OF THE CENSUS, COUNTY AND CITY YEARBOOK, 1967, Table 3; EDITOR AND PUBLISHER YEARBOOK, 1966; BROADCASTING YEARBOOK, 1966; and TELEVISION FACT BOOK, 1966.

*** The following discussion is based on the New York Standard Metropolitan Statistical Area (SMSA) as defined by the Bureau of the Census and which includes New York City, Nassau, Suffolk, Westchester and Rockland Counties.

† This includes only general coverage newspapers and excludes specialized publications.

stations and 70 AM and FM radio stations. All of the television stations, and a great many of the radio stations, can be received throughout the area; but many of the 21 daily newspapers have only a small or very local circulation. Of the nine dailies which are published in the five counties which make up New York City, only three (the *Times*, the *News*, and the *Post*) are of general circulation in the metropolitan area; the other six are published in the boroughs and have a circulation essentially local. The other twelve dailies are published outside of New York City, and consist of nine published in Westchester County, one in Rockland County, and two on Long Island. Each of these is the only daily in a "one-daily" town or city; and each of them has essentially a local circulation.* It is quite evident that broadcasting stations, far from being "scarce", are more numerous than the daily newspapers, and present a greater number and variety of "voices" to the public.

In addition to the fact that there are fewer daily newspapers than there are broadcasting stations, observers have noted that more and more of these dailies occupy a monopoly position in their particular localities. In most cities in the United States where a daily newspaper is published, there is only one such newspaper; or there are two newspapers (*e.g.*, a morning and an evening paper) which are owned by the same owner.

Nixon & Ward, *Trends in Newspaper Ownership and Inter-Media Competition*, 38 JOURNALISM QUARTERLY 3 (1961) contains an exhaustive survey and tabulation of the situation as it was in 1960. Some startling facts emerge from the information which they have compiled. In 1909, of the 1207 cities where dailies were published 689, or 42.9% of these cities had competing dailies; but this figure has steadily dropped, so that by 1960, although there were then 1461 cities where dailies were published, *only 61 of these cities had competing dailies*. Thus, of all the cities in the country where dailies were published in 1960, 95.8% of these had no competing daily newspapers. By contrast,

* Compiled from EDITOR & PUBLISHER YEARBOOK, 1966 and BROADCASTING YEARBOOK, 1966.

the citizen of such a city would typically have a number of broadcasting stations in the locality to which he could turn for his daily information and news.

This striking decline in the number of competing "voices" available to the public in the daily newspaper medium makes it more important today than ever before that broadcasters be free to engage in robust criticism and vigorous debate and that they be able to determine, without governmental interference or compulsion, what views they will broadcast, and the time to be allotted to each of them. It has been noted that radio and TV may provide a healthy competition for newspapers and by this competition help to reduce any tendency to bias on the part of the newspaper, CHENERY, *FREEDOM OF THE PRESS* 164 (1955). Congressman Emanuel Celler has observed with respect to this situation, in Celler, *The Concentration of Ownership and the Decline of Competition in News Media*, 8 *ANTITRUST BULLETIN* 175 (1963), that:

"Radio and television, of course, make it possible to preserve a variety of 'voices' despite the newspaper monopolies in most of our cities today." 8 *ANTITRUST BULLETIN* at 184.

Another commentator has said:

"Many stations and newspapers, each with an individual viewpoint, will more adequately present minority views than few stations and newspapers each presenting many viewpoints." Dill, *A Fairness Doctrine for the Press*, 7 *PUBL. ENT. & ALLIED FIELDS L. QUARTERLY* 93, 104 (1967).

In sum, the facts are that broadcasting is an important part of the press, that the available channels of broadcasting communications are abundant and far more numerous than the avenues of daily newspaper communication, and that no Constitutional distinction can legitimately be drawn between these two media of communication.*

* The argument has now come full circle. Relaxation of the requirements of the First Amendment with respect to broadcasting was originally justified on the ground that broadcasting was different from printed media, such as newspapers. Now, with a

Nor can any distinction be drawn by characterizing broadcasting frequencies as something owned by the people or somehow in the public domain. The concept of ownership of the frequencies by the people is simply not a helpful tool in approaching the problem of applying the First Amendment to broadcasting.* If anything is to be derived from that concept, it would be as easy to deduce that the government can completely control and dictate what is to be broadcast as it is to arrive at any conclusion short of that.

Surely it is not within the power of Congress, merely by denominating some means of communication "publicly owned" or "affected by a public interest" to preclude or diminish the application of the First Amendment. If so, why not declare a public interest in newsprint, or printing presses, or newspaper kiosks in public places and thereby bring the press to heel, or why not invoke the public control over the street corners on which handbills are distributed to require that such handbills be "fair" in their treatment of public figures? Even a facility so obviously and completely under the ownership and control of the government as the post office cannot be denied to those who refuse to conform to a standard of proper, decorous, or fair utterance. *Lamont v. Postmaster General*, 381 U.S. 301 (1965). As Justice Brennan pointed out in his opinion in that case, in which Justice Goldberg concurred: "If the Government wishes to withdraw a subsidy or a privilege, it must do so by means and on terms which do not endanger First Amendment rights." (381 U.S. at 310). And in *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946) the Court held the Postmaster General to be unauthorized to withdraw the second class mail privilege as a means of imposing censorship on periodicals.

recognition that there is no constitutionally significant difference between the media, some commentators argue from the broadcasting precedent that a "fairness doctrine" should be applied to newspapers. E. g., Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). Thus is the freedom of the press gradually eroded.

* See, e.g., Segal and Warner, "Ownership of Broadcasting Frequencies: A Review," 19 ROCKY MOUNTAIN L. REV. 111 (1947).

It is, of course, true that there is a strong public interest in responsible and effective broadcasting. This public interest confers on broadcasters a responsibility which most of them recognize. The public interest and the responsibility to the public do not derive, however, from the fact that broadcasters use the airwaves. It would make as much sense to say that the journalistic responsibility of newspaper publishers derives from the fact that their newspapers are distributed in public places or by the use of the second-class mailing privilege or to say that the responsibility of political candidates to be fair in their public utterances is attributable to the fact that their words are transmitted through the "public" air by sound waves. The responsibility of broadcasters is the same as that of newspapers, book, and magazine publishers and others who perform a service to the public in the dissemination of news and information. It rests on the national interest in the public being adequately informed.* To base this responsibility on the accident that broadcasters employ a medium on which interference will occur unless frequencies are assigned is to magnify the irrelevant.

Broadcasters do indeed have a heavy responsibility. But like other agencies which bear the responsibility of disseminating information and views to the public the responsibility is a moral one. As with other segments of the free press, abuses undoubtedly occur. But, as with other segments of the press, an attempt to prevent those abuses by the imposition of governmental authority through an agency dispensing "fairness" creates a risk which is inadmissible in a free society.

(C) Governmental Compulsion of Access to the Press Contravenes the First Amendment

The second basis on which the Commission has sought to justify the "fairness doctrine" is on the theory that it is attempting merely to guarantee access to the press for

* The Commission recognized this when it stated in its 1949 REPORT ON EDITORIALIZING:

"It is this right of the public to be informed . . . which is the foundation stone of the American system of broadcasting." 13 F.C.C. at 1249.

views which should be heard and that this serves, rather than subverts, the First Amendment.

It is submitted that such a view misconceives the historic role of a free press in this country and the meaning of freedom of the press as guaranteed by the First Amendment.

In *Bridges v. California*, 314 U.S. 252 (1941), Mr. Justice Black summarized the spirit of the times in which the freedom of the press evolved and was guaranteed:

“Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that *the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.*” 314 U. S. at 265. (Emphasis added.)

The concept of a free press which was forged out of the colonial and revolutionary experience, and which was embodied in the brief phrase “Congress shall make no law . . . abridging the freedom of . . . the press,” was the concept of a press unfettered and capable of acting as a positive and independent force. It was to be a press whose expressed views would be its own, and not those mandated by the government or any agency of government.

Constitutional historians have uniformly recognized that the thrust of the First Amendment was toward the protection of the press as an active and independent force, rather than as a passive or supine medium. *E.g.*, II COOLEY, CONSTITUTIONAL LIMITATIONS 885-86 (8th ed. 1927).

As Morris Ernst has pointed out, the focus was on freedom for those who had the capacity to publish or speak, and who were therefore in a position to make themselves heard:

“The framers of our Constitution lived in an era when the right to print and talk was used to liberate us from distant controls. Freedom was needed for the preacher and editor, rather than for the flock or

the subscribers. A free press was essential for the man with type and ideas." M. ERNST, *THE FIRST FREEDOM* 14 (1946).

It was, of course, recognized that a press free of restraint would bring evil as well as good, that the press might, on occasion, be licentious, dishonorable or unfair, but it was thought that the benefits of an unfettered press were worth this risk.

In his reply in 1798 to a letter from Talleyrand protesting against the pamphlets printed in the United States containing "insults and calumnies" against the French Government, John Marshall stated:

"The genius of the Constitution, and the opinions of the people of the United States, cannot be overruled by those who administer the Government. Among those principles deemed sacred in America, . . . there is no one . . . more deeply impressed on the public mind, than the liberty of the press. *That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn.*"

II A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 329-30 (1919). (Emphasis added.)

This history of the development and interpretation of the Constitutional guarantee makes it perfectly clear that what was guaranteed was a *free press*, not free access to the press. The guarantee of a free press has never meant, and does not mean today, that it is the province of government to secure for every individual, group, or point of view free and equal access to the press.*

* Benjamin Franklin is reported to have said that his newspaper was not a stagecoach with seats for everyone. MOTT, *AMERICAN JOURNALISM* 55 (3d ed. 1962). A substantial body of case law has subsequently held that there is no right of access to the press. In *McIntire v. Wm. Penn Broadcasting Co. of Philadelphia*, 151 F. 2d 597 (3d Cir. 1945), *cert. denied*, 327 U. S. 779 (1946), which involved a federal action by a clergyman whose broadcasting contracts had been broken by defendant's radio station, the court

There are two views which might be taken of the role of the government with respect to the press in a free society. One view is that the role of the government is to regulate the press in such fashion that it serves as a platform for all voices that wish to be heard or for all voices that, by some standard, ought to be heard. The difficulties with such a view, among others, are that it places the government in a position to control, either overtly or subtly, the information and views which are disseminated to the public and that it seriously impedes the press in the performance of its active and independent role as what the Supreme Court has termed an "interpreter" between the government and the people. *Grosjean v. American Press Co.*, 297 U. S. 233, 250 (1936).

The second view, and the one undoubtedly enshrined in the Constitution, is that the safer and better course is to deprive the government of any power to control and regulate the views expressed by the press.

No one can quarrel with the proposition that, in a democratic society, it is important that a diversity of views and information reach the public ear and that no significant point of view be denied a hearing. The question posed here, however, is what means are permissible to secure that end. If it is to be secured by the day-to-day supervision of the

affirmed the dismissal of the complaint on the ground that it failed to state a federal cause of action and stated:

"Assuming arguendo that the defendant's cancellations of the plaintiffs' contracts have limited plaintiffs' opportunities to speak or preach freely, the First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant is not an instrumentality of the federal government but a privately owned corporation. The plaintiffs seek to endow WPEN with the quality of an agency of the federal government and endeavor to employ a kind of 'trustee-of-public-interest' doctrine to that end. But Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind." (151 F. 2d at 601).

Accord, Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F. 2d 497 (1st Cir. 1950); *Lord v. Winchester Star, Inc.*, 346 Mass. 764, 190 N. E. 2d 875 (1963), *cert. denied*, 376 U. S. 221 (1964); *Commonwealth v. Boston Transcript Company*, 249 Mass. 477, 144 N. E. 400 (1924).

press by a governmental body which has the power to compel it to publish particular views, or to prevent it from publishing certain views unless it also publishes others, the agencies of government become actively engaged in controlling what the public will hear. It is precisely that risk that the First Amendment was designed to meet.

The Commission's "fairness doctrine", in the ruling here in issue, constitutes an impermissible infringement by a governmental agency on the freedom of an important segment of the press.

Conclusion.

For the reasons stated, it is submitted that the ruling of the FCC should be set aside.

Respectfully submitted,

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APPENDIX.

COMMUNICATIONS ACT OF 1934, AS AMENDED

* * *

§315. Candidates for public office; facilities; rules.

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

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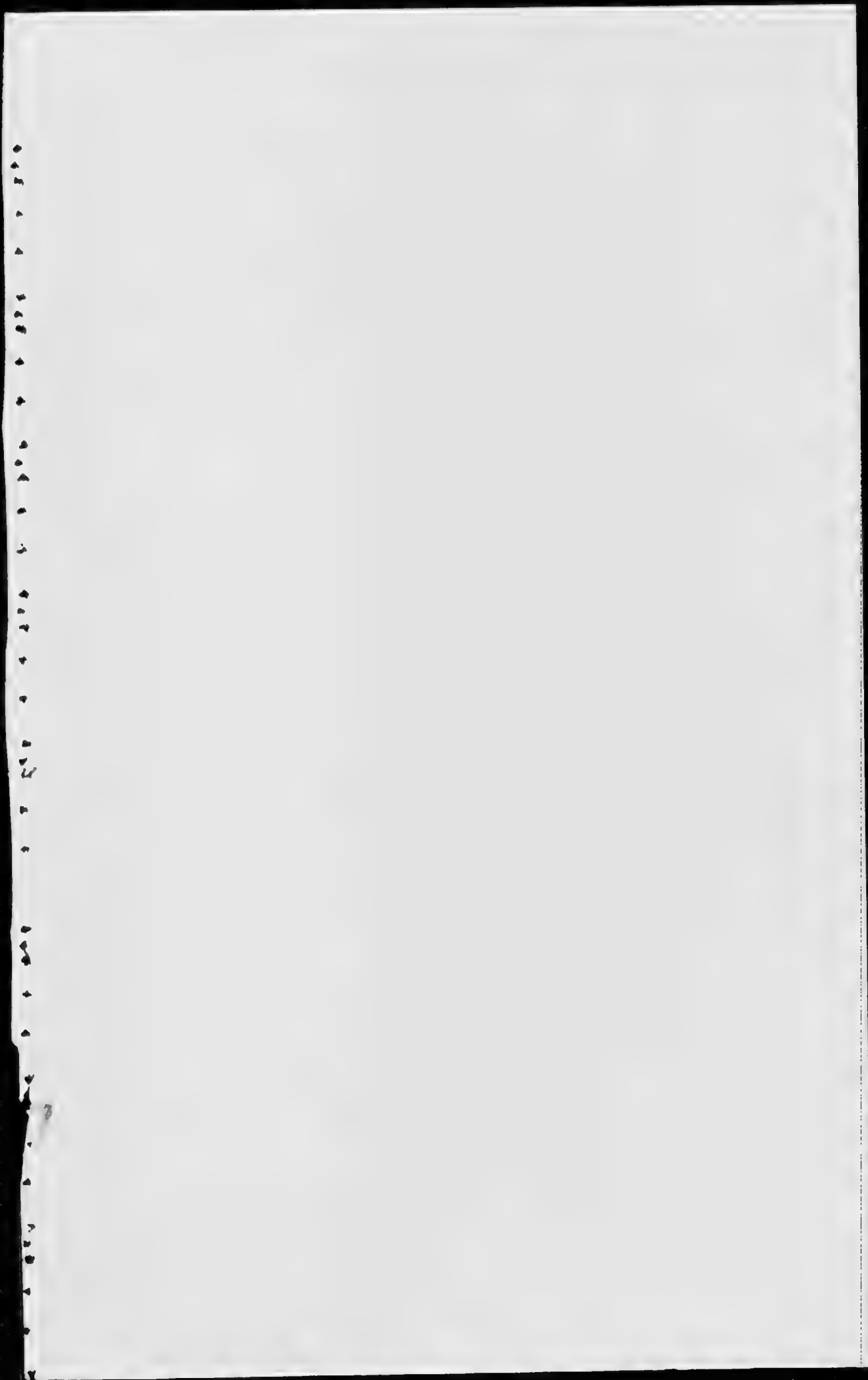
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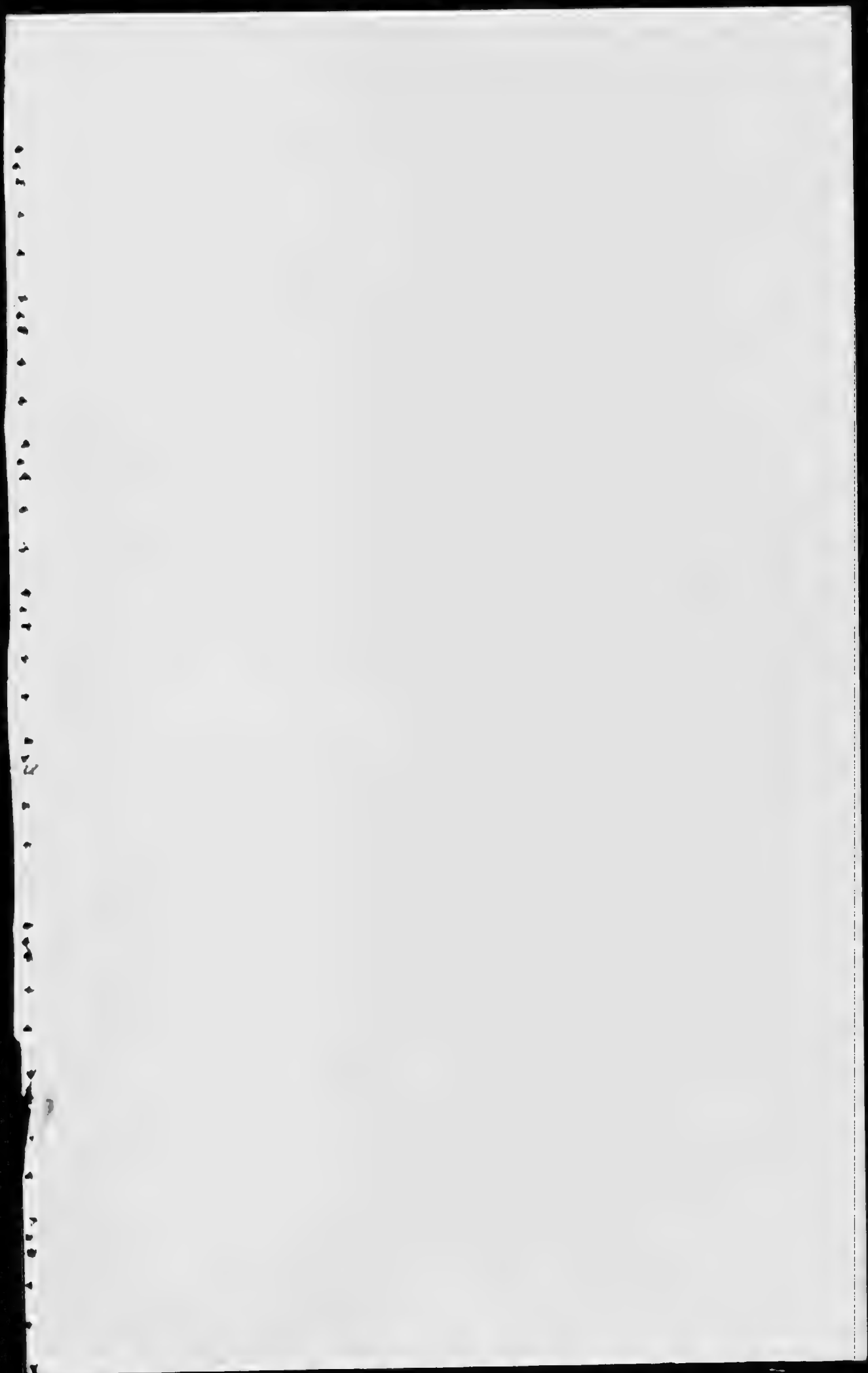
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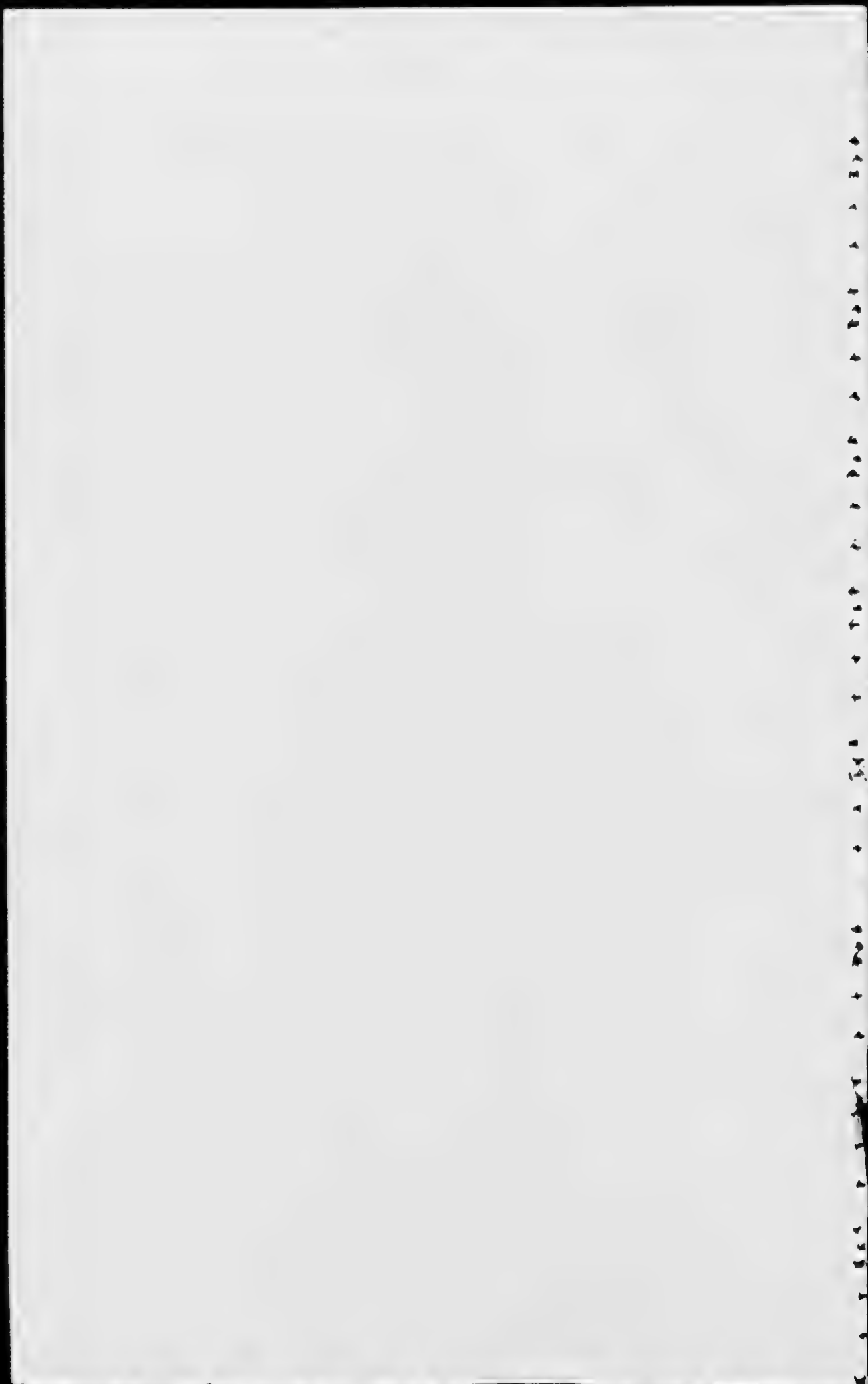
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**FEDERAL CIGARETTE LABELING AND
ADVERTISING ACT**

PUBLIC LAW 89-92; 79 STAT. 282

**An Act to regulate the labeling of cigarettes,
and for other purposes.**

*Be it enacted by the Senate and House of Representatives
of the United States of America in Congress
assembled, That:*

This Act may be cited as the "Federal Cigarette Label-
ing and Advertising Act".

DECLARATION OF POLICY

Sec. 2. It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

DEFINITIONS

Sec. 3. As used in this Act—

(1) The term "cigarette" means—

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance,

the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

(2) The term "commerce" means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island and any place outside thereof; (B) commerce between points in any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island, but through any place outside thereof; or (C) commerce wholly within the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island.

(3) The term "United States", when used in a geographical sense, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, and Johnston Island.

(4) The term "package" means a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers.

(5) The term "person" means an individual, partnership, corporation, or any other business or legal entity.

(6) The term "sale or distribution" includes sampling or any other distribution not for sale.

LABELING

Sec. 4. It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the

United States any cigarettes the package of which fails to bear the following statement: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

PREEMPTION

Sec. 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

(c) Except as is otherwise provided in subsections (a) and (b), nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes, nor to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or require an affirmative statement in any cigarette advertisement.

(d) (1) The Secretary of Health, Education, and Welfare shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually thereafter, concerning (A) current information on the health consequences of smoking and (B) such recommendations for legislation as he may deem appropriate.

(2) The Federal Trade Commission shall transmit a report to the Congress not later than eighteen months after

the effective date of this Act, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

CRIMINAL PENALTY

Sec. 6. Any person who violates the provisions of this Act shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than \$10,000.

INJUNCTION PROCEEDINGS

Sec. 7. The several district courts of the United States are invested with jurisdiction, for cause shown, to prevent and restrain violations of this Act upon the application of the Attorney General of the United States acting through the several United States attorneys in their several districts.

CIGARETTES FOR EXPORT

Sec. 8. Packages of cigarettes manufactured, imported, or packaged (1) for export from the United States or (2) for delivery to a vessel or aircraft, as supplies, for consumption beyond the jurisdiction of the internal revenue laws of the United States shall be exempt from the requirements of this Act, but such exemptions shall not apply to cigarettes manufactured, imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside of the United States.

SEPARABILITY

Sec. 9. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the other provisions of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

TERMINATION OF PROVISIONS AFFECTING
REGULATION OF ADVERTISING

Sec. 10. The provisions of this Act which affect the regulation of advertising shall terminate on July 1, 1969, but such termination shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to the date of enactment of this Act.

EFFECTIVE DATE

Sec. 11. This Act shall take effect on January 1, 1966.
Approved July 27, 1965.

REPLY BRIEF OF INTERVENORS
NATIONAL BROADCASTING COMPANY, INC.,
AMERICAN BROADCASTING COMPANIES, INC.
AND WLLE, INC.

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 21,285

JOHN F. BANZHAF, III,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

United States Court of Appeals
for the District of Columbia Circuit

No. 21,525

No. 21,526

FILED MAY 7 1968

WTRF-TV, INC., and NATIONAL
ASSOCIATION OF BROADCASTERS,

Petitioners,

CLERK

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 21,577

THE TOBACCO INSTITUTE, INC.,
THE AMERICAN TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO
CORPORATION, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

PETITION TO REVIEW AND SET ASIDE AN
ORDER OF THE FEDERAL COMMUNICATIONS
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CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of May, 1968, served the printed "Reply Brief of Intervenor National Broadcasting Company, Inc., American Broadcasting Companies, Inc. and WLLB, Inc." by sending copies thereof by first-class mail, postage prepaid, to the following:

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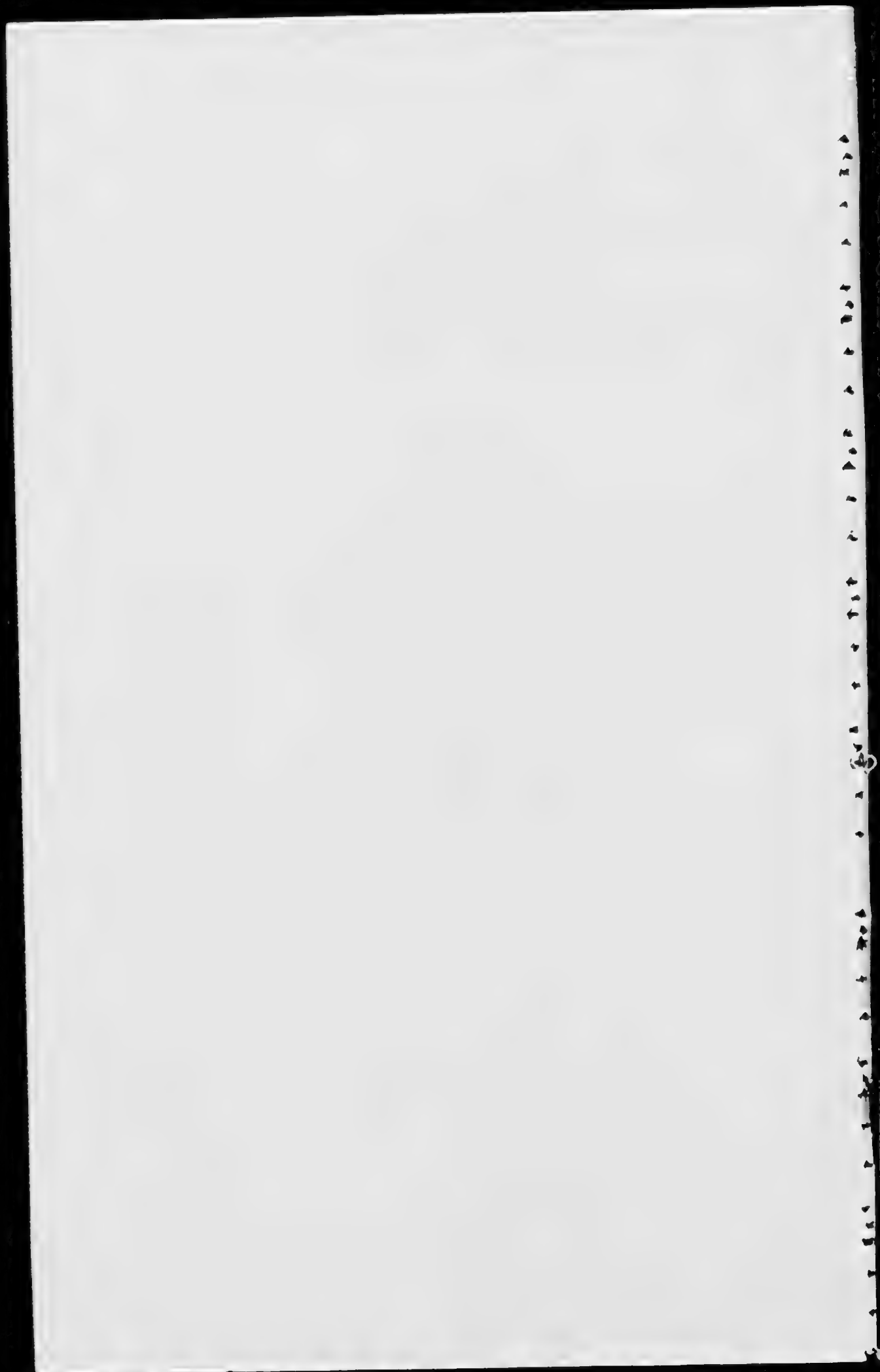
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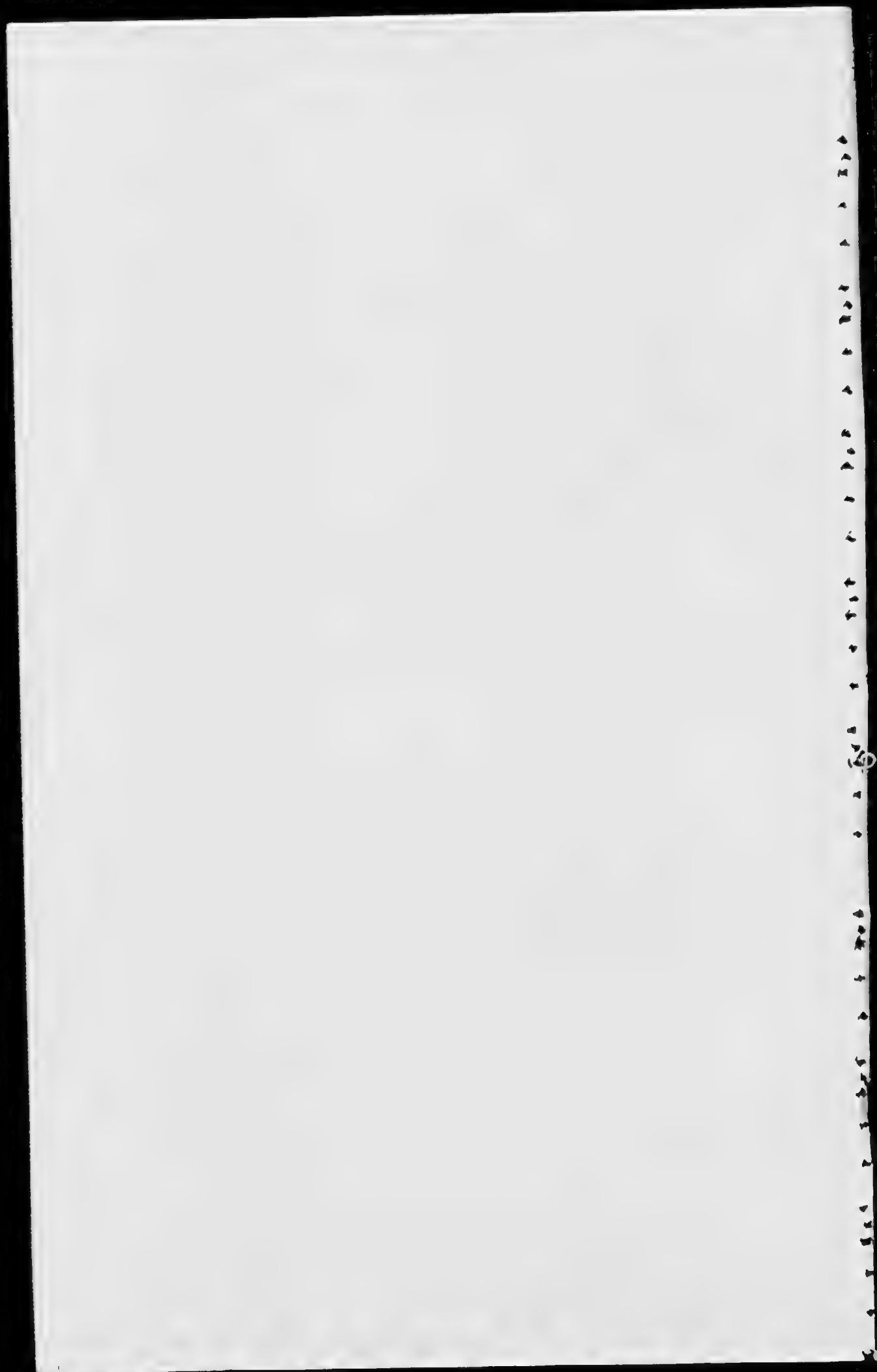
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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOHN F. BANZHAF, III,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

Case No. 21,285

WTRF-TV, Inc., and NATIONAL ASSOCIA-
TION OF BROADCASTERS,
AMERICAN BROADCASTING COMPANIES,
INC.,
THE TOBACCO INSTITUTE, INC. *et al.*,
Intervenors.

WTRF-TV, Inc., and NATIONAL ASSOCIA-
TION OF BROADCASTERS,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

Case No. 21,525

Case No. 21,526

SPARTAN RADIOCASTING Co.,
PALMETTO RADIO CORP.,
WAVE, Inc., *et al.*,
Intervenors.

THE TOBACCO INSTITUTE, INC.,
THE AMERICAN TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO
CORPORATION,
LARUS & BROTHER COMPANY, INC.,
LIGGETT & MYERS TOBACCO COMPANY,
PHILIP MORRIS INC.,
R. J. REYNOLDS TOBACCO COMPANY,
UNITED STATES TOBACCO COMPANY and
P. LORILLARD COMPANY,
Petitioners,

Case No. 21,577

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

**REPLY BRIEF OF INTERVENORS NATIONAL
BROADCASTING COMPANY, INC., AMERICAN
BROADCASTING COMPANIES, INC., AND
WLLE, INC.**

I.

**The Commission's ruling is foreclosed by the
Cigarette Labeling and Advertising Act of 1965.**

The immense difficulty which the Commission faces in attempting to square its present ruling with the Cigarette Labeling and Advertising Act (hereinafter "Cigarette Act" or "Act") is illustrated by the tenuous distinctions which it is forced to draw in attempting to define the area within which it still claims freedom of action. Thus, the respondents concede that the Act precludes the Commission from requiring that statements of health warnings be included in the advertising and "possibly even adjacent to cigarette commercials." (Resp. Br., p. 41). The Commission also conceded in its opinion denying the Petitions for Reconsideration (Memo. Opinion and Order, Par. 24, R. 830) that to require that *equal* time be given to programming with respect to the health issue "would be inconsistent with the Congressional direction in this field provided in the Labeling Act" because, in the Commission's words, "the practical result of any roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising."

In making these concessions the respondents apparently recognize that Congress intended, in enacting the Cigarette Act, to prevent, not only direct regulation of the content of cigarette advertising, but also regulatory activity which might discourage or inhibit cigarette advertising by placing economic or other burdens on it. Having made this concession, it is difficult to understand how the Commission can draw a viable distinction between the ruling which it made

here and the regulatory activities which it admits Congress intended to bar.*

As the respondents concede, the scope of the preemption of the Cigarette Act is defined by Section 2 of the Act, as well as by Section 5 (Resp. Br., p. 40). Section 2, in its introductory language, states the policy of Congress "to establish a comprehensive Federal program *to deal with cigarette labeling and advertising with respect to any relationship between smoking and health . . .*". (Emphasis supplied). In subsection (2) of Section 2 Congress proceeds to define one of its objectives as being the protection of the national economy against the burdens which might be imposed by "diverse, non-uniform, and confusing *cigarette labeling and advertising regulations with respect to any relationship between smoking and health.*" (Emphasis supplied). Again, Section 10 defines the provisions which would terminate on July 1, 1969 as "the provisions of this Act which affect *the regulation of advertising . . .*".

The Commission's argument is based on a consistent refusal to recognize that what Congress intended, as is clearly reflected in this language, was to prevent "advertising regulations" concerning the "relationship between smoking and health", other than the labeling requirement which it specifically imposed. It is evident that a requirement that a licensee broadcast responsive material in the same week in which advertising is carried is just as much a "regulation of advertising" as a requirement that the licensee carry the responsive material in the time period immediately following the advertisement.

Once the Congressional objective is defined, most of the arguments made by the Commission can quickly be dealt with. For example, the respondents' argument that the preemption for which petitioners contend might affect in

* The respondents do not define what they mean by "adjacent." No criterion is suggested by which the Commission has been able to determine that it may not require the broadcasting of a warning within a minute or an hour after the advertisement has been broadcast, but that it may require the broadcasting of such a warning during the same day or the same week or the same month.

some way state laws forbidding the sale of cigarettes to minors or state laws requiring smoking education campaigns to be presented in public schools is clearly unsound (Resp. Br., pp. 40-41). These statutes are obviously not statutes which involve "advertising regulations." Similarly unsound is the respondents' argument that under our view "the Commission would be powerless to take any action designed to inform the public on the smoking question" (Resp. Br., p. 41). If the action taken by the Commission did not attempt to inform the public by means of regulation based on the carrying of advertising, then it might well fall outside the scope of the preemption which Congress intended. The characteristic of the Commission's action which marks it as falling within the area of preemption is the fact that it ties the compulsion of the broadcasting of health warnings to the carrying of cigarette advertising by the station licensee and thereby burdens and inhibits cigarette advertising contrary to the intent of Congress.

It is for the same reason that the respondents' argument that the Commission is furthering national policy is ill-founded. As we demonstrated in our main brief (pp. 21-22), and as respondents recognize (Resp. Br., p. 44), the Cigarette Act was not adopted as an anti-smoking statute, but as a compromise measure balancing the competing objectives defined in Section 2 of the Act. It is, of course, correct to say, as the respondents do, that Congress intended that, during the study period for which it provided, the public would receive information concerning the possible hazards of smoking and voted funds for this purpose. It is not correct, however, to say that Congress intended to permit the securing of this objective by placing restrictions or burdens on cigarette advertising itself. A striking illustration of the Commission's misconception may be found in the suggestion in respondents' brief (p. 46) that one way in which a licensee may satisfy the obligation imposed by the Commission is by choosing "not to carry cigarette commercials . . .". It is perfectly clear that Congress did not wish to permit regulation having this kind of impact during the period which it specified.

Nor have respondents found any adequate explanation of the legislative history, which clearly shows that Congress intended to preclude regulation of the kind which the Commission has here undertaken. Senator Cotton plainly stated in the floor debate, that it was the intention of an "overwhelming majority" of the Senate Committee on Commerce that "*any restriction* in the matter of advertising in magazines and elsewhere should be held in abeyance." (111 Cong. Rec. 13899; emphasis supplied). This cannot fairly be distorted into the respondents' construction, that by "any restriction" Senator Cotton was referring only to the specific restriction contemplated by the original FTC proposal, *i.e.*, a requirement that a warning be contained in the advertising itself. (Resp. Br., p. 45)

Nor can the dialogue between Senator Magnuson and the Surgeon General, quoted at page 20 of our main brief, be construed as a suggestion only that broadcasters would not be obligated to air Public Health Service announcements (Resp. Br., p. 46). A reading of the dialogue makes it clear that the participants understood that broadcasters would not be obliged to carry material on the hazards of smoking, from whatever source it came. Thus, the Surgeon General pointed out that there were "quite a few other organizations who are vitally concerned about this problem" who "may very well propose this," *i.e.*, propose to secure the broadcasting of information about the hazards of smoking on public service time. Senator Magnuson, in response, quite rightly pointed out that the issuance of a report having news value is commonly given "full coverage" without any specific governmental requirement that this be done.

Finally, the respondents are disingenuous in the extreme in their argument based on cases holding that repeals by implication are not favored. As was demonstrated in our main brief (pp. 31-34), the Communications Act provides no explicit authorization, and indeed no authorization at all, for the so-called "fairness doctrine." It certainly provides no explicit authorization for the regulation by the Commission of cigarette advertising. Prior to the enactment of the Cigarette Act, the Commission had not been

applying its "fairness doctrine" to cigarette advertising, or, indeed, to product advertising of any other kind.* In the course of the legislative consideration which led to the adoption of the Cigarette Act the Commission expressly disclaimed any interest in undertaking regulation in this area and advised Congress that it "had not held proceedings or undertaken studies to evaluate the various factors and considerations in this area." (NBC/ABC/WLLE Main Brief, p. 17). In these circumstances, it is absurd for the Commission to suggest that Congress must have intended to permit it to act since it did not include in the Cigarette Act any specific limitation on the exercise of its authority.

In sum, the language and legislative history of the Cigarette Act make it clear that Congress intended to preclude, during the period which it specified, any regulation of advertising addressed to the relationship between cigarette smoking and health. By the ruling which is here challenged the Commission has plainly transgressed that prohibition.

II.

The Commission's application of the "fairness doctrine" to cigarette advertising is arbitrary, capricious and an abuse of discretion.

The Commission attempts to justify the ruling challenged here as a logical and natural application of the "fairness doctrine", pursuant to which it has sought to

* The attempt to suggest, in the Banzhaf brief (pp. 4, 26-28) that the Commission's ruling in *In re Petition of Sam Morris*, 11 F.C.C. 197 (1946) established a Commission policy of applying the "fairness doctrine" to advertising borders on the absurd. That 1946 decision suggesting that the "fairness doctrine" might be applicable to liquor advertisements in certain undefined circumstances, has never since been followed, had dropped into oblivion until resuscitated by Mr. Banzhaf, and by no stretch of the imagination can be regarded as reflecting the Commission's policy in this area.

require that its licensees provide time for the expression of the various viewpoints which exist with respect to any controversial public question. The Commission, however, exhibits a curious ambivalence in defining the controversial question which forms the basis of its ruling. From time to time in respondents' brief we find suggestions that cigarette advertising is an expression of the view that smoking is not a hazard to health or that it is "not incompatible with good health" (Resp. Br., p. 21). In these instances the Commission seems to be suggesting that the controversial issue as to which the various viewpoints must be heard is whether smoking poses a health hazard.

Elsewhere in their brief, and perhaps more commonly, the respondents suggest that the controversial issue is a broader one, *i.e.*, whether it is desirable to smoke.* Indeed, respondents sum up the Commission's ruling in the following language:

"In essence, the Commission has simply found that cigarette advertising by promoting the use of a product which may be habit forming and, which has serious health implications, without more, has raised one side of a controversial issue." (Resp. Br., pp. 29-30).

Respondents have apparently gravitated to this latter position because of the impossibility of demonstrating that cigarette advertising does, in fact, directly or by implication make any health claim.**

* Thus, for example, the respondents suggest that a controversial issue is presented because "cigarette commercials are conveying any number of reasons why it appears desirable to smoke" (Resp. Br., p. 20), because "a chief purpose in cigarette advertising is to promote smoking" (*Ibid.*), that "cigarette advertising does present a pro-smoking point of view" (Resp. Br., p. 29), and the like.

** Indeed, as was noted in our main brief, if such advertising did, either directly or by implication, make a health claim the problem could be dealt with by the Federal Trade Commission (See, NBC/ABC/WLLE Main Brief, p. 25).

Respondents cannot make true by frequent repetition the proposition that to say that a cigarette tastes like a spring breeze or is a millimeter longer than its competitor is to say something about the impact of smoking on health. To portray an attractive person enjoying a smoke no more makes a health claim than to depict a person eating ice cream suggests that ice cream won't make one fat or fill his arteries with cholesterol. The absurdity of the respondents' position becomes evident when they deal, passingly, with radio advertising. Thus, respondents, after arguing that broadcasters convey to the television audience the idea that smoking is "not incompatible with good health" by "manipulation of visual imagery", go on to say that the message is carried "to the radio audience in a different way" (Resp. Br., p. 21). Their failure to describe this "different way" is understandable, and no doubt calculated. It is, of course, evident that a radio message extolling the taste of a cigarette neither says or implies anything about health.*

The fact that the Commission's ruling is not, in truth, based on a finding that cigarette advertising makes a health claim is also evident from the Commission's application of the ruling across-the-board to all radio and television cigarette advertising. The Commission surely cannot have found that it is impossible for a cigarette advertisement not to make a health claim. Yet, if the Commission were in fact resting its ruling on the proposition that every cigarette advertisement deals with the issue of health, only such a finding would support the breadth of the ruling. We are driven to the conclusion that respondents are more candid about the basis of the ruling when they suggest that the controversial issue raised by cigarette advertising is the *desirability* of smoking, not the *healthfulness* of smoking.

* An attempt is made in the Banzhaf brief (p. 8) to suggest that particular cigarette advertisements say something about health. In the first place it is doubtful that the advertisements cited carry the implications which Banzhaf suggests. In any event, it would be irrelevant if they did, since the Commission's ruling applies to all cigarette advertisements and the specific advertisements which were the subject of the ruling are not of the kind cited by Banzhaf.

If, however, the controversial issue which forms the basis of the Commission's ruling is the issue whether people should smoke, then the difficulty is in arriving at any basis, which is not purely arbitrary, for distinguishing cigarette advertising from the advertising of a multitude of other products. The Commission does not, of course, take the position that all product advertising raises controversial issues, and that any broadcaster who carries advertising must therefore present programming which is critical of the product, or the category of products, which he advertises.

The Commission's ruling, and the respondents' brief, provide little help in ascertaining the precise principle upon which the Commission intends to rely in distinguishing between the situations in which responsive materials must be broadcast and the situations in which they need not be. Respondents appear, however, to be attempting an articulation of the applicable rule at page 17 of their brief when they say:

"Where a broadcaster allows his facilities to be used to encourage consumption of a product which—according to studies of private and public agencies—can in normal use be harmful to health, an obligation arises to inform the public of this aspect of the matter."

The Commission cannot contend that cigarette smoking is distinguished from the use of other products by any unanimity of views as to the dangers of smoking. Respondents recognize that the record made before Congress was replete with testimony of recognized experts in the field disagreeing with the Surgeon General's report in whole or in part. Thus, they quote from a report of the Senate Committee relating to the testimony of 39 physicians and scientists to the effect that it had not been demonstrated scientifically that smoking causes lung cancer or other diseases. (Resp. Br., p. 34). Respondents also recognize that the House Committee was not "willing to opt for either medical opinion" and that "Congress appeared unwilling to embrace one or another position . . ." (*Ibid.*) Indeed, it is presum-

ably implicit in the Commission's finding of a controversial issue that there is continuing dispute on the subject.*

Cigarettes are not, of course, the only product which has been claimed to be harmful to health or has been the subject of studies which have concluded or suggested that harm might result from its normal use. Harm or risk or inadequacy of some kind have been attributed, at one time or another, to most products, with varying degrees of rationality and varying degrees of merit in the criticism. Thus, respectable authorities have seen risks in pesticides,** tranquilizers,*** saturated fats and cholesterol-laden foods,† artificial sweeteners,†† and allegedly unsafe

* Among the many witnesses who gave testimony criticizing or disagreeing with the Surgeon General's report were Dr. John H. Mayer, Jr., head of the Division of Thoracic Surgery of the Kansas City General Hospital and Medical Center; Dr. William B. Ober, director of laboratories at the Knickerbocker Hospital in New York City, and a cancer specialist; Professor K. A. Brownlee of the University of Chicago, author of two widely used textbooks; and Dr. Thomas Burford, Chief of Chest Surgical Service at Barnes Hospital and Professor at the Washington University School of Medicine.

** Rachel Carson, *The Silent Spring* (1962) pp. 158-61, 202-04. Miss Carson notes that many household insecticides contain substances whose dangerous toxicity has been the subject of both governmental and private concern. *Id.* at 158.

*** At least one of the statistical studies of the relationship between smoking and death rates shows a high correlation between death rates and the taking of tranquilizers. Hammond, *Smoking in Relation to Mortality and Morbidity*, Statistical Research Section, Medical Affairs Department of the American Cancer Society.

† For example, a study published by the National Center for Health Statistics (Series II, No. 22) entitled "Serum Cholesterol Levels in Adults—United States 1960-62" by F. Moore, among many others, finds an association between high serum cholesterol and coronary heart disease. Many leading authorities recommend reduced saturated fat intake to lower serum cholesterol. *E.g.*, Grande, *Dietary Factors and Serum Cholesterol*, in *PREVENTION OF ISCHEMIC HEART DISEASE*, ed. Raab (1966) at p. 266.

†† See, *e.g.*, Sayer, *Artificial Sweeteners—Their Impact on the Food Laws*, 21 *FOOD, DRUG COSMETIC LAW JOURNAL*, 111 (1966), pp. 111-12; XVIII News Report, National Academy of Sciences, No. 3, p. 6 (March 1968).

makes or models of American automobiles,* among many possible examples.

Moreover, while the principle, as framed in respondents' brief, is limited to products claimed to be "in normal use harmful to health", no reason appears why harm to health should have some favored status as opposed to harm to other social interests, *e.g.*, environmental beauty, the protection of property, physical comfort and well-being, or moral or spiritual values. If the Commission is empowered to compel the broadcasting of responsive material whenever advertising is carried of products claimed to be harmful to health, no reason appears why it is not also empowered to compel the broadcasting of such material in connection with the advertising of products claimed to be harmful in any other way.

What we are apparently left with is a roving commission in the FCC to sift and weigh what is written and published about products which are advertised on radio or television, to determine when, by some standard which the Commission refuses to articulate, the published opinions have a sufficient consensus or are expressed with sufficient stridency to move the Commission to action, and then to compel the broadcasting of responsive material, without the Commission itself arriving at any judgment either as to whether the criticism of the product is accurate or whether the public has inadequate information to enable it to decide that question for itself.

The potentiality of the Commission's alleged principle of action is further amplified by the fact that there is nothing in this ruling, or in the basis for it, which would limit the Commission's action to the area of advertising. The Commission has mandated the broadcasting of anti-smoking material, not because cigarettes are *advertised* on television and radio, but because pro-smoking views are *expressed* on television and radio. If, in determining what issues are raised by non-advertising program materials, the

* Thus it has been argued that many automobiles, in normal use, are excessively dangerous because of design deficiencies or the lack of available safety devices. Nader, *Unsafe at Any Speed* (1965); Kearney, *Highway Homicide* (1966).

Commission is to be as subtle as it has been here, then it would be able to regard almost any broadcast as expressing, either directly or by implication, a view as to which some response might be necessary. If the Commission regards every cigarette commercial as expressing a view on the health hazards of cigarette smoking, might it not with equal reason regard the smoking of a cigarette by the protagonist in a play as expressing a pro-smoking point of view, or the telecasting of a military parade as expressing a pro-war point of view, or the televising of a view of a smog-choked city as expressing a point of view on the subject of air pollution? Such examples may be characterized by the respondents "as a parade of horrors"; the difficulty, however, is that the Commission has provided no understandable criterion to distinguish between those situations which fall within the scope of its ruling, and those which do not.

It is evident that this ruling marks a sharp break with any concept that broadcast licensees are responsible for the selection and development of the programming for their stations and that they are not to be penalized for the reasonable exercise of their judgment. In the past the Commission has been careful to emphasize that the obligation of the licensee did not go beyond the obligation to make its own reasonable judgments as to whether a controversial issue of public importance is involved in any particular programming; if so, what viewpoints should be presented and what spokesman heard; and the frequency, length, and format of material to be presented. The licensees are now told, however, that since, *in the Commission's judgment*, a health claim may be found in cigarette advertising, and *in its judgment* there is sufficient clamor to make the issue controversial, and *in its judgment* time each week is necessary to inform the public adequately, the licensee is deprived of all discretion in the matter, and is compelled to carry programming of the kind which the Commission thinks is appropriate.

No one denies that Congress and the agencies which Congress creates can regulate dangerous products. On appropriate findings the distribution of products may be forbidden, and violators subjected to criminal penalties.

Nor is there any doubt that deceptive labeling or advertising can be dealt with by the agencies of government. The justification for such regulation lies in the fact that it can prevent social ills and can be based on standards susceptible of reasonably fair and efficient definition and application. If the test is merely whether the advertisement is false or misleading, reasonably precise standards for answering that question can be devised. If the test is whether a product produces harm sufficient to warrant prohibiting or limiting its sale, Congress or the agency charged with responsibility can determine what the harm is and whether the need for or utility of the product is sufficient to warrant risking that harm.

The Commission is operating under no comparable set of standards. It has not determined whether the product is or is not harmful but only that there is an outcry from a number of sources. It has not determined that the advertisements are false or misleading, but only that, in its view, they imply something about health. Administrative action with enormous impact, not only on the financial fortunes of those who feel the effect of the regulation, but also on the content of what is published by an important segment of the press, cannot properly be rested on criteria so amorphous.

III.

The Commission's "fairness doctrine" as applied in this case violates the First Amendment.

While respondents say that it is "well-nigh frivolous" to suggest that the Commission's action violates the First Amendment (Resp. Br., p. 55), the Supreme Court's grant of certiorari in the *Red Lion* case, 381 F. 2d 908 (D. C. Cir.), cert. granted, 389 U. S. 968 (1967), its postponement of the argument in that case until it can have the benefit of the views of the United States Court of Appeals for the Seventh Circuit in *Radio Television News Directors Association v. FCC*, Nos. 16,369, 16,498 and 16,499, and the recent well-reasoned arguments and statements questioning the prem-

ises and constitutionality of the "fairness doctrine" join in suggesting that this issue merits the most careful consideration.* Moreover, the ruling challenged here suggests that the "fairness doctrine" may, in its vague and shifting contours, pose threats not evident to this Court when it decided the *Red Lion* case.

Respondents' constitutional position is based entirely on the obvious *non-sequitur* that, because broadcasting must be "regulated," the Commission must, as a part of that regulation, monitor and control the "fairness" of what is broadcast. Thus the fundamental basis of the respondents' position is that "Repeal of the Communications Act would still create chaos" (Resp. Br., p. 53) and that "Since the radio spectrum is limited, government may and must regulate access to it. . . ." (Resp. Br., p. 51). No one denies, however, the necessity for whatever regulation is required to prevent destructive interference. The real issue is whether there is anything about broadcasting which warrants the particular kind and degree of regulation which the Commission has attempted here.

A consideration crucial to a determination of how much, and what kind of, regulation of broadcasting is permissible is the question why regulation is necessary at all. If, as respondents say, the regulation is the result of some "uniqueness" of broadcasting, it is a relevant question what the "uniqueness" is and what kind of regulation it inevitably calls for.

The essential need for broadcasting regulation does not flow, as respondents suggest, from the fact that there are more persons who wish to broadcast than there are places in the frequency spectrum. Even if there were room for all, regulation would be necessary in order that two broadcasters not occupy the same space. The need for regulation flows, in the first instance, from the phenomenon of interference, a phenomenon which does not exist in other media of communication. It is true that, whenever the number of

* E.g., Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15 (1967); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967).

applicants exceeds the number of frequencies available, the Commission may be required, in addition to assigning frequencies, to select among the applicants. This second step is not, however, universally or inevitably necessary since in many communities there are more frequencies available than there are persons able and willing to use them.* In such communities, the only need for regulation which inevitably flows from the nature of broadcasting is the need that each broadcaster be assigned a specific frequency on which to operate.

The question then becomes whether, in those communities in which a selection must be made among applicants, there is anything in the nature of broadcasting which requires that the selection be based, in part, on an evaluation of the "fairness" of what the licensee has broadcast.

It is evident that the kind of regulation we are here considering, *i.e.* the imposition of a requirement of fairness, would be impermissible with respect to newspapers, books, magazines and other media of communication. Respond-

* One commentator has said that:

"In almost all radio and television markets, economic barriers to entry will come into play before the technical barriers. The economic limitations have already become the dispositive factor in the growth of radio and television stations in many, if not most, small and medium-sized markets. The barrier to entry to further stations in those areas is not the technical unavailability of frequencies, but rather the economic inability of the area to support an additional station and the unavailability of sources of programming different from that which is already being provided by the existing stations. This situation then is identical to the situation in all large mass communications media." Robinson, *loc. cit. supra*, pp. 158-59.

To the same effect is C. SIEPMANN, *RADIO TELEVISION AND SOCIETY* at 225 (1950):

"More men can get into radio's domain today, and at far cheaper cost, than into the newspaper world."

See also F. THAYER, *LEGAL CONTROL OF THE PRESS* 126 (1956); Sullivan, *Editorials and Broadcasting: The Broadcasters Dilemma*, 32 GEO. WASH. L. REV. 719, 756-61 (1964); *Note, Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 705-06 (1964); *Note, The Federal Communications Commission and Program Regulation*, 41 NEB. L. REV. 826, 838-39 (1962).

ents apparently concede this much since they appear to recognize that their argument can succeed only if they are able to differentiate broadcasting from the daily newspaper and other communications media in some relevant way.

Respondents apparently concede as well that no special requirement for regulation flows from any insufficiency in the number of broadcasting voices as compared with newspaper voices. Thus, they do not challenge the proposition that radio and television voices now outnumber daily newspapers. They suggest, rather, that there is no significance in the comparative number of voices that are available in the two media, but only in the fact that in broadcasting there must be a selection among applicants because, in some areas of the country, the number of applicants exceeds the number of available channels. (Resp. Br., pp. 53-54) Again, respondents rely wholly on the assumption, neither proved nor explained, that, because there must be a selection among applicants, that selection must take "fairness" in programming into account.

The Commission has never undertaken to demonstrate, either in this proceeding or anywhere else, that there is something about the impact of broadcasting or the nature of the listening public which makes it more essential than in other media that programming be wholly unbiased. There is no reason to believe that any such necessity exists. Speaking of the underpinnings of the Commission's policy in this area, Professor Jaffe recently commented, in a paper submitted to the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce:

"Closely related to the notion of TV's uniqueness is the notion of what I would call its autonomy. This is the notion—more or less resting on its uniqueness—that TV is not simply a part of the whole complex of communication. It is thought to be separate, a complete system of communication in itself, in the sense that it has an audience which is reached primarily, even exclusively, by it. A large mass of TV and radio listeners are conceived as insulated from other channels of communication. It is supposed

that they do not read newspapers, magazines, or books and, it would seem, do not receive information informally from their friends, associates, or organizations. * * *

"In the absence of more precise information than I have, I can only speculate as to its validity. *I question the validity of the notion of the insulated listener both as a fact and as a significant phenomenon.*" Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and The Local Service Obligation: Implications of Technological Change*, at pp. 2-3 (U. S. GOVERNMENT PRINTING OFFICE, 1968) (Emphasis supplied).

The difficulty with the Commission's position is that it has undertaken to supervise the fairness of broadcasting, in apparent recognition that such regulation of other media is forbidden by the First Amendment, but without articulating what it is about broadcasting that makes such regulation so urgently necessary. No record has been made in any forum to show that broadcasting must be singled out of the communications complex for this special form of regulation. As has been demonstrated, the Commission's emphasis on the fact that a selection must be made among applicants does not meet the point since it does not inevitably follow that the selection must take into account "fairness" in broadcasting.

Broadcasting is not the only medium of expression which requires the intervention of government to license the opportunity for expression. A close analogy can be found in cases relating to the licensing of streets and other public places for the conducting of parades or other public demonstrations. As Professor Kalven has pointed out: "You cannot have two parades on the same corner at the same time." Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 25 (1965). Indeed, only a limited number of parades or demonstrations can be accommodated by a single city at a particular time. It does not follow from this, however, that a municipality may require any particular parade or demonstration to be "fair" in what it expresses or that its sponsors present a

parade expressing a contrary point of view. And it would surely be unconstitutional for a government agency to review the plans for each parade to determine whether, in the light of the content of the ideas to be expressed, one parade should be preferred over another in order to give equal voice to every "legitimate" view.

In a series of decisions the Supreme Court has affirmed that although a state "may lawfully regulate the conduct of those using the streets", it must not in the process abridge First Amendment freedoms. *Schneider v. State of New Jersey*, 308 U. S. 147, 162 (1939) (distribution of handbills); *Talley v. California*, 362 U. S. 60 (1960); *Cox v. New Hampshire*, 312 U. S. 569 (1941); *Guyot v. Pierce*, 372 F. 2d 658 (5th Cir. 1967).

Ordinances have frequently been struck down where by virtue of their vagueness or the undue discretion conferred upon local officials, there was a possibility of their being applied in such a way as to permit governmental control of the content of expression. *E. g.*, *Guyot v. Pierce, supra*; *King v. City of Clarksdale*, 186 So. 2d 228 (Miss. 1966); *Lovell v. Griffin*, 303 U. S. 444, 451 (1938); *Saia v. New York*, 334 U. S. 558, 562 (1948). As the court pointed out in *Kunz v. New York*, 340 U. S. 290 (1951);

"... we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places."
(340 U. S. at 294)

It is evident that if the only uniqueness of broadcasting lies in the phenomenon of interference and the necessity, in some circumstances, of selection among applicants, it does not follow from that uniqueness that the Commission may regulate the "fairness" of what is broadcast, any more than the Post Office could deny the enormously valuable*

* *United States ex rel. Rodriguez v. Weekly Publications, Inc.*, 68 F.Supp. 767, 770 (S.D.N.Y. 1946); Ablard & Harrison, *The Post Office and Publishers' Pursestrings: A Study of the Second-Class Mailing Permit*, 30 GEO. WASH. L. REV. 567 (1962).

second-class mailing privilege to a periodical which was not "fair" on the smoking issue.* Certainly it does not follow that such regulation may be effected on the basis of standards and criteria so vague as to give the Commission a free, and almost unreviewable, power to select those views the expression of which it will compel, and those which it will not.

As Commissioner Loevinger said, in an opinion dissenting from the Commission's recent action in amending the personal attack rule by which it has implemented its "fairness doctrine" in one area:

"Thus I come to the fourth reason to dissent to adoption of the revised rules, which is that they give the Commission greater power to influence or control the expression of ideas than should be given to any Government agency. . . .

• • • • •
 "In the present matter the Commission's changeable, erratic and confusing course in its efforts to codify and clarify its own uncertain precedents demonstrates an absence of such consideration, skill and precision as is required in this area.

• • • • •
 "Certainly in the area of First Amendment freedoms doubts should be resolved against the existence or exertion of government power to control. . . . The Commission course with respect to these rules argues strongly against the wisdom of their adoption. The rules as revised seem clearly to burden, and thus abridge, free expression through the broadcast media. In case of even arguable conflict between administrative action or power and First Amendment protections I will not hesitate to resolve every doubt in favor of maintaining the First Amendment freedoms."**

* *Hannegan v. Esquire*, 327 U. S. 146 (1946).

** Memorandum Opinion and Order, FCC 68-356 adopted March 27, 1968, In the Matter of Amendment of Part 73 of the Rules Relating to Procedures in the Event of a Personal Attack, Dkt. No. 16574, Dissenting Opinion of Commissioner Loevinger, pp. 8-10.

Conclusion.

For the reasons stated, it is submitted that the ruling of the Commission should be set aside.

Respectively submitted,

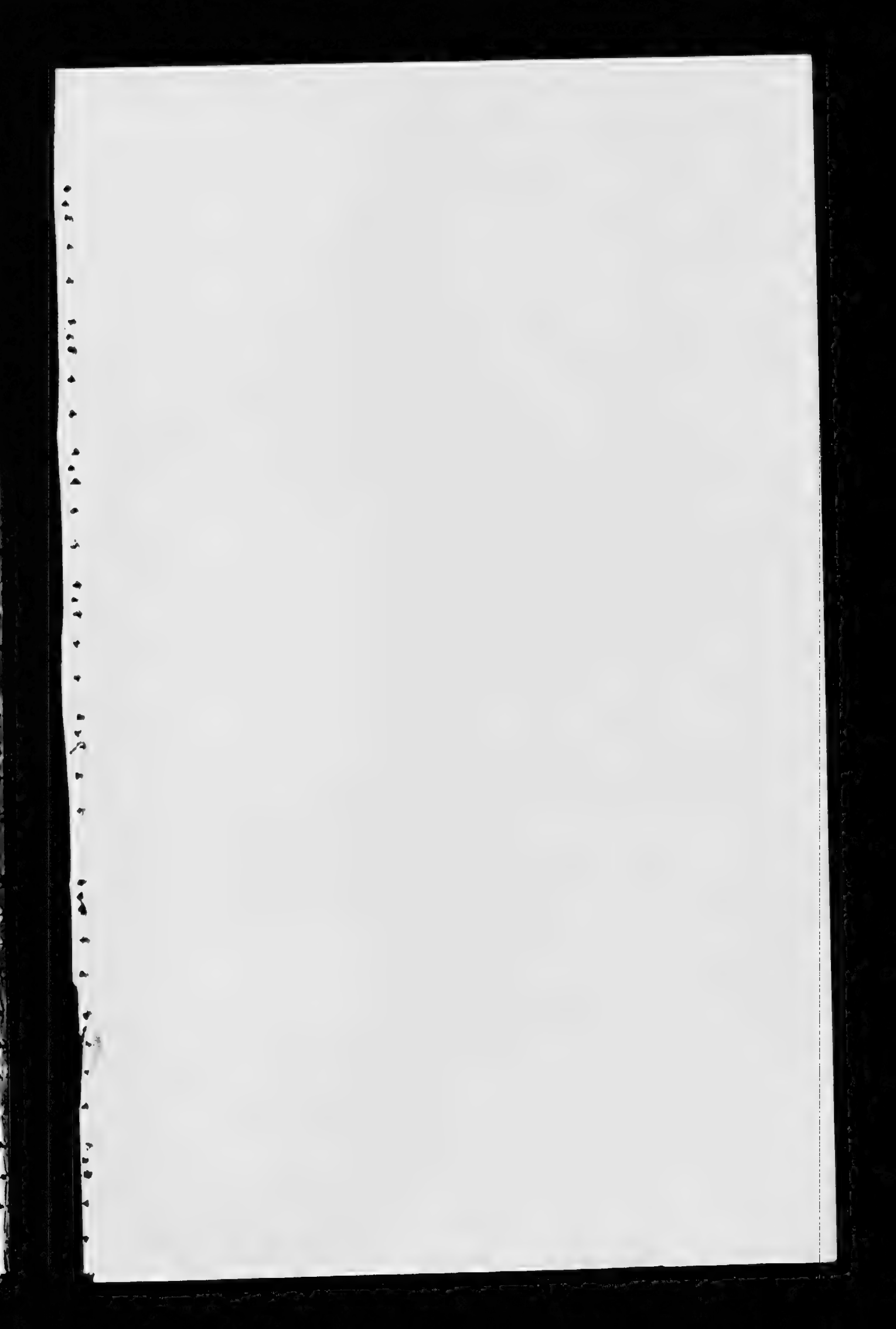
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**AMICUS CURIAE BRIEF OF NATIONAL
TUBERCULOSIS ASSOCIATION**

IN THE
United States Court of Appeals
for the District of Columbia Circuit
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 21,285

JOHN F. BANZHAF, III,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 21,525

No. 21,526

WTRF-TV, INC., and NATIONAL ASSOCIATION
OF BROADCASTERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Petitioners,

Respondents.

No. 21,577

THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO
COMPANY, BROWN & WILLIAMSON TOBACCO CORPORA-
TION, et al.,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Petitioners,

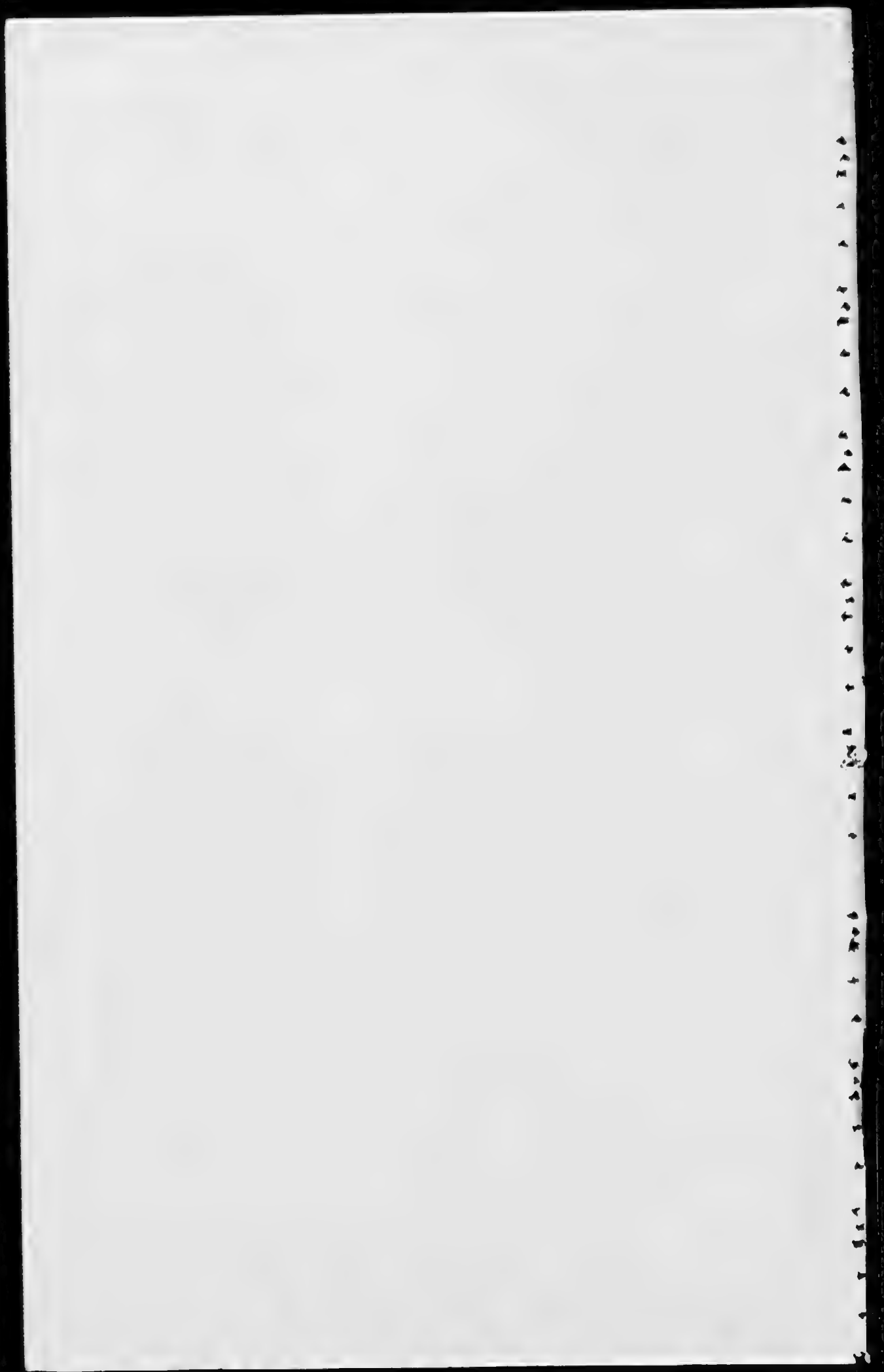
Respondents.

**ON CONSOLIDATED PETITIONS TO REVIEW
AND SET ASIDE AN ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION**

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AMICUS CURIAE BRIEF OF NATIONAL TUBERCULOSIS ASSOCIATION

Statement

This *amicus curiae* brief is submitted with the consent of all parties by the National Tuberculosis Association in support of the decision of the Federal Communications Commission applying the "Fairness Doctrine" to all licensee broadcasters which present advertisements in favor of cigarette smoking.

The National Tuberculosis Association is a charitable corporation organized and existing under the laws of the State of Maine. Originally, its principal purposes were the prevention, cure, care and control of tuberculosis. More recently such purposes have been expanded to include the same with respect to bronchitis, emphysema and all other respiratory diseases. To reflect such expanded purpose, the Association recently changed its name to National Tuberculosis and Respiratory Disease Association (hereinafter sometimes the "NTA").

The NTA's Concern

As indicated, the NTA is primarily concerned with cigarette smoking in relation to chronic respiratory diseases, especially emphysema and chronic bronchitis, and their crippling and fatal effects. Of particular concern to it is the increasing threat these diseases present to children and youth and the urgent need to do everything possible to prevent them.

The hazards of cigarette smoking are startling, particularly in NTA's field of concern. In his 1964 report the Surgeon General concluded that:

"1. Cigarette smoking is the most important of the causes of chronic bronchitis in the United States, and increases the risk of dying from chronic bronchitis.

"2. A relationship exists between pulmonary emphysema and cigarette smoking but it has not been established that the relationship is causal. The smoking of cigarettes is associated with an increased risk of dying from pulmonary emphysema.

"3. For the bulk of the population of the United States, the importance of cigarette smoking as a cause of chronic bronchopulmonary disease is much greater than that of atmospheric pollution or occupational exposures.

"4. Cough, sputum production, or the two combined are consistently more frequent among cigarette smokers than among nonsmokers.

"5. Cigarette smoking is associated with a reduction in ventilatory function. Among males, cigarette smokers have a greater prevalence of breathlessness than nonsmokers."

In his supplementary report in 1967 the Surgeon General added:

"Additional evidence from the four major prospective studies indicates that cigarette smokers have a markedly increased risk of dying from chronic bronchitis and pulmonary emphysema. The range of risk varies for cigarette smokers between three and 20 times the mortality rates for nonsmokers * * *."

* * *

"Additional evidence strongly supports the conclusion in the Surgeon General's 1964 Report that cigarette smoking is the most important of the causes of chronic bronchitis in the United States, and increases the risk of dying from chronic bronchitis."

* * *

"The relation of cigarette smoking to death from bronchitis and emphysema is presented by mortality ratios in table 2 * * *"

* * *

“Table 2.—Age-adjusted mortality ratios for current smokers of cigarettes only, by number of cigarettes smoked daily

Cause of death	Cigarettes smoked per day at entrance to study				
	Occasion- al or never smoked	1-9	10-20	21-39	40+
Bronchitis or emphysema or both (500-502, 527.1)	1.0	4.6	10.0	11.8	18.2
Bronchitis with or without emphysema (500-502) ..	1.0	3.6	4.5	4.6	8.3
Emphysema (527.1)	1.0	5.3	14.0	17.0	25.3

Source: U. S. Veterans study (44).”

“* * * Deaths from chronic bronchitis and emphysema have been summarized in table 3 which gives mortality ratios by the number of cigarettes smoked each day. Here, again, the mortality is much higher among smokers and is directly related to the number of cigarettes smoked. The mortality ratios reported for both diseases combined are similar to those reported for the U. S. Veterans study.”

“Table 3.—Age-adjusted mortality ratios for smokers of cigarettes only by number of cigarettes smoked daily

Cause of death	Cigarettes smoked per day at entrance to study			
	Non-smokers	1-9	10-20	21+
Bronchitis or emphysema or both	1.0	6.1 ¹	10.0 ¹	10.4 ¹
Bronchitis with or without emphysema (500-502) ..	1.0	7.0	13.7	14.6
Emphysema (527.1)	1.0	4.8	6.1	6.9

¹ Calculated from (12).

Source: Canadian Pensioners study (12).”

In the light of the Surgeon General's Reports of 1964 and 1967 and the findings of the NTA's own Medical Section, the Board of Directors of the NTA passed the following resolution on February 10, 1968, setting forth its position and policy on and with respect to cigarette smoking:

“The Board of Directors of the National Tuberculosis and Respiratory Disease Association views with deep concern the overwhelming evidence that cigarette smoking is a disastrous health hazard. Such evidence is cited in a 1967 Public Health Service Review entitled, ‘The Health Consequences of Smoking,’ and in a recent statement by the NTRDA's medical section, the American Thoracic Society, entitled ‘Smoking and Health’. The principal conclusions in these statements may be condensed, and paraphrased as follows:

1. There is massive evidence that cigarette smokers die younger than non-smokers. In addition the risk of disability from lung cancer, chronic bronchitis, emphysema, coronary heart disease, and certain other diseases is much greater

among cigarette smokers than among non-smokers.

2. The risk is related to the number of cigarettes smoked per day and the number of years a person has smoked them.
3. Even apparently healthy cigarette smokers have some impairment of their lungs and breathing capacity. Frequently they have a chronic cough with sputum, which are symptoms of chronic bronchitis.
4. Stopping smoking almost always improves lung function and reduces or stops cough and sputum production. It clearly reduces also the risk of illness and death from coronary heart disease, lung cancer, and emphysema.
5. The risk of death and disability among former cigarette smokers decreases remarkably after ten years of nonsmoking.

"On the basis of the above evaluations, the Board of Directors of the National Tuberculosis and Respiratory Disease Association reaffirms and endorses with even greater emphasis its decision taken in 1960 to promote an intensive effort to prevent the establishment of this lethal habit.

"Our chief weapon is education—to promote understanding of the hazards of cigarette smoking in every segment of our adolescent and adult population. It is the obligation and opportunity of every person and organization interested in the health of Americans to participate in this movement. Specifically, each tuberculosis and respiratory disease association is urged to develop and sponsor an active program to prevent young people from becoming smokers, and to convince smokers that they should stop smoking.

"This is the responsibility of all of us."

The fact is that emphysema, chronic bronchitis and asthma, all "obstructive lung diseases", together are now the tenth cause of death in this country. Emphysema accounts for the bulk of these deaths; the increase in emphysema deaths has been extremely rapid in recent years. Today, this disease is the second most frequent single disease for which workers are retired early, with disability benefits approximately ninety million dollars (\$90,000,000) annually.

The ultimate and most important concern and that which in our opinion "triggered" the imposition of the Fairness Doctrine in this case is the impact of cigarette advertisements on the children and youth of our nation. Except for a passing unsustainable claim (NBC *et al.* Br., p. 23), nowhere in petitioners' extensive "constitutional", "fairness" and other legal arguments is this problem considered. The "public interest" (which the petitioners would have this Court disregard as "pre-empted", constitutionally overridden, etc.) sought to be served or protected herein is the same "public interest" which requires that since minors are among the listening and viewing public there be certain censorship rules, such as the prohibition of obscenity, nudity, etc., from the airwaves. For essentially the same reasons, i.e., protection of the physical health and life of our youth, as with their moral health, the petitioners' economic interests and arguments should fail and the greater public interests should be protected and prevail.

From the foregoing it is clear that the National Tuberculosis Association has a direct and substantial interest in the outcome of these proceedings and for this reason it is serving and filing this *amicus curiae* brief herein.

The Issue

Many issues have been raised and much has been written in favor of and against the FCC's decision in this case but we think and submit that the basic issues are few and their resolution should not be difficult.

The principal issue is whether the FCC may, in requiring a licensee broadcaster to operate in the public interest, apply the Fairness Doctrine to such broadcaster when it carries advertisements in favor of cigarette smoking.

Much of the confusion on the issues herein may arise from what appears to be a misstatement and/or a misunderstanding of at least two of the basic questions involved.

For example, petitioners (hereinafter petitioners means other than Banzhaf) argue at length that because Congress enacted a law providing that "no statement relating to smoking and health shall be required *in* the advertising of any cigarettes the packages of which are labeled in conformity with . . ." the law, all other governmental authorities are precluded from promulgating and enforcing any law or rule which might have *an effect on* the advertising of cigarettes. So to state and argue the issue as petitioners have done is to answer it adversely to them because the Cigarette Labeling Act is not drafted so as to preclude any regulation which may have *an effect on* advertising. The real issue is whether Congress in the enactment of the Cigarette Labeling Act meant to restrict the FCC (or any other governmental body for that matter) from carrying out a conjunctive statutory duty, in the FCC's case the duty to require licensee broadcasters to operate in the public interest, or whether the two statutes involved may not be read and applied conjunctively with one another.

Similarly, much of petitioners' argument is also directed at a claimed "unfairness" in the application of the Fairness Doctrine because broadcast licensees which broadcast cigarette commercials and which grant a significant amount of time to spokesmen for the view that smoking may be hazardous to health are not required to grant reply time to cigarette manufacturers for the view that smoking may not be hazardous to health.

This also appears to us to be a misunderstanding of the basic question in that the FCC's finding and conclusion

is that cigarette commercials portray the use of cigarettes as attractive, desirable and enjoyable and encourage people to smoke and by so doing convey the message "that smoking carries relatively little risk." It is this affirmative presentation of cigarette smoking as a desirable, and implicitly safe, habit which is the issue of public importance to which the Fairness Doctrine attaches and which requires a presentation of the opposing view that there may be risks or health hazards involved therein.

The constitutional, arbitrariness and procedural issues posed by the petitioners on this appeal seem to us to be answered for the most part by the facts and history of this proceeding, by this Court's opinion in *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 381 F. 2d 908 (1967), and by the FCC's Memorandum Opinion and Order (R. 814-874) and they will only be treated briefly herein.

ARGUMENT

POINT I

The Communications Act and the Cigarette Labeling Act must be read and applied in conjunction with one another.

The fact that the FCC's decision may have an effect on cigarette advertising does not preclude the FCC from requiring licensees to operate in the public interest.

Long before the Cigarette Labeling Act was enacted, Congress enacted the Radio Act of 1927 and the Communications Act of 1934 and established first the Radio Commission and thereafter the FCC. Such Commissions established, promulgated and expanded the Fairness Doctrine (1929-1949) and the FCC indicated such Doctrine to be applicable to advertising involving issues of public importance in *Petition of Sam Morris*, 11 FCC 197 (1946).

Following the formal adoption of such Doctrine by the FCC in a 1949 report, Congress officially approved and sanctioned it and made it crystal clear that nothing would be construed to relieve broadcasters from the obligation (i) "to operate in the public interest" and (ii) "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" when it amended Section 315(a) of the Communications Act of 1934 with the following provision:

"* * * Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

It cannot reasonably be disputed that the question of whether or not a person or the public should smoke cigarettes is an "issue of public importance". The statutory mandate to all licensees is clear that as to all such issues they must afford reasonable opportunity for the discussion of conflicting views. The fact that one side of the issue of public importance is posed in commercial advertising rather than in a newscast, an editorial, a paid announcement, a documentary or otherwise, is immaterial; the obligation exists not by virtue of the type of broadcast but by the fact that the question is an "issue of public importance".

There certainly can be no question but that advertising falls within the public interest responsibilities of a licensee. *Head v. New Mexico Board of Examiners*, 374 U. S. 424, 437-441 (1963).

Moreover, as noted, broadcasters have the additional statutory obligation of operating at all times in the "public

interest". Indeed, as the FCC points out in its opinion, apart from the Cigarette Labeling Act, "ordinarily the question presented would be how the carriage of such commercials (advertising) is consistent with the obligation to operate in the public interest".

While the FCC expresses reservations concerning its power to forbid broadcast licensees from carrying any cigarette advertising as being contrary to the "public interest", we believe such a decision to be well within the power and authority of the Federal Communications Commission and that such power and authority were not abrogated or modified by the Cigarette Labeling Act. The so-called pre-emptive provisions in the Act certainly do not prohibit any such action. They merely prevent the insertion of statements relating to smoking and health in the advertising of cigarettes; they do not preclude the elimination of such advertising and should not in a medium such as broadcasting otherwise subject to the dictates of the overriding "public interest".

The FCC and its predecessor have heretofore, with judicial approval, denied renewal of a license to stations which broadcast programs inimical to the public interest. *KFKB Broadcasting Association v. Federal Radio Commission*, 47 F. 2d 670, 671 (C.A.D.C., 1931); see also *Farmers and Bankers Life Insurance Co.*, 2 F.C.C. 455, 457-459; *WSBC, Inc.*, 2 F.C.C. 293, 294-296, and *Oak Leaves Broadcasting Station, Inc.*, 2 F.C.C. 298.

The power to deny renewal of a license or to prohibit a program in its entirety on the ground of inconsistency with the "public interest" is clearly greater than the power to impose the Fairness Doctrine and, absent specific contrary statutory authority which is not present here, would certainly encompass and permit the latter. The greater necessarily includes the less.

With respect to petitioners' claim of pre-emption, there are and have been over the years innumerable Acts of

Congress which overlap and affect the requirements of other Acts but, except in the case of outright conflict, such Acts have consistently been read in conjunction with one another and not as pre-emptive of one another. The case at bar, if anything, presents a far stronger case than the normal one because here there is no actual overlap.

The Cigarette Act regulates the tobacco industry's advertisement of its product. The Communications Act regulates the operation of broadcast licensees in the public interest and in requiring reasonable opportunity for discussion of conflicting views on issues of public importance. While enforcement of one may have an indirect effect upon enforcement of the other, such should not invalidate either one of the Acts. They can and should be read and applied in conjunction with one another as the FCC has done in this case.

Nonetheless, petitioners attempt to create a conflict between the two Acts in this case by arguing that the preclusion by Congress of any statement relating to smoking and health "in the advertising of any cigarette" in the Labeling Act also precludes the requirement of any such statement "outside" the advertising of any cigarette by the Fairness Doctrine under the Communications Act. This argument is as fallacious as it sounds. The Fairness Doctrine requires no statement in any advertisement; nor does it require any such statement either immediately prior to or after any commercial. The fact that the Doctrine requires a broadcast licensee (not the cigarette advertiser) at some different and unrelated time to select a spokesman of its own choosing to present an opposing view because the issue of cigarette smoking is one of public importance is as the FCC maintains merely supplemental to and not in conflict with either the letter or spirit of the Labeling Act.

Nor does it help petitioners' argument for them to contend that the FCC's application of the Fairness Doctrine

to cigarette advertising may have an effect on, or may have the effect of requiring warnings in, the advertisement of cigarettes. Such argument, we submit, merely emphasizes the fact that the FCC's decision is imposed on the broadcast licensees, not the tobacco industry, and may only indirectly (if at all) affect the tobacco industry.

This Court rejected a similar argument of the petitioners in the *Red Lion* case to the effect that the Fairness Doctrine had the effect of being a prior restraint on the broadcast licensees and hence was violative of the First Amendment to the Constitution. In its rejection of such argument this Court said:

"The petitioners are in no manner exposed to or subject to any prior censorship of their broadcasts. Their latitude in the selection of program material, program substance, program format, and identity of program personnel is bounded only by their own determination of the public interest appeal of their end product. They are not required to submit any broadcast material to the Commission, or any other Government agency, prior to broadcast. It is obvious that there is involved in this case no censorship which constitutes prior or previous restraint."

Similarly, in the case at bar, the broadcast licensees "are in no manner exposed to or subject to" any requirement that they insert in any cigarette advertisement any statement relating to smoking and health. "Their attitude in the selection of program (cigarette advertising) material, program (cigarette advertising) substance, program (cigarette advertising) format, and identity of program (cigarette advertising) personnel is bounded only by their own determination of the public interest appeal of their end product", their own self-imposed codes and the rules of the FTC with respect to misrepresentation.

It scarcely needs saying that if Congress had intended the result sought by the petitioners in this case, it would

most certainly have used language other than "in the advertising"; for example, it would have used "in connection with the advertising", "with respect to the advertising", etc.

If petitioners' argument that the words "*in* the advertising" encompass all statements which may have an effect on the advertising of cigarettes is carried to its logical conclusion, then the Cigarette Labeling Act could be said to preempt the provisions of the Internal Revenue Code imposing taxes on cigarettes and/or on the profits of cigarette companies for the reason that some portion of such revenues undoubtedly are used by the Department of Health, Education and Welfare for the promotion of statements contrary to and having an effect on cigarette companies' promotional advertising.

It is clear that when Congress used the word "in" in the statute it did so advisedly and with aforethought and it did not intend to preclude any and all statements "outside" of the advertising of cigarettes which might have an effect on such advertising.

It is also perfectly clear that the application of the Fairness Doctrine to broadcast licensees carrying cigarette advertising will not require any statement relating to smoking and health "in" the advertising of cigarettes and that all such statements will be necessarily "outside" of and apart from such advertising.

In view of the foregoing, it is abundantly clear that there is no basis for or substance to petitioners' argument that the Cigarette Labeling Act precludes the application of the Fairness Doctrine to broadcast licensees carrying cigarette advertisements.

POINT II

Cigarette advertisements necessarily convey the message that cigarette smoking is not harmful and the Fairness Doctrine requires merely that a significant amount of time be devoted by a licensee to the opposing view.

Petitioners argue that the application of the Fairness Doctrine to licensees is unfair in that cigarette companies are not accorded free time to reply to any spokesman selected by the licensees to answer their initial advertisements in favor of cigarette smoking.

Their claim is in essence that their regular commercials do not raise any health issue and hence they should be entitled to free time to reply to any answers which assert that cigarette smoking may be dangerous to a person's health.

As the FCC points out, however, affirmatively urging people to smoke cigarettes and portraying such smoking as attractive, enjoyable and desirable carries with it the message that there is no danger in cigarette smoking. In sum, cigarette commercials unquestionably present one side of the basic controversial issue; the Fairness Doctrine requires only that a significant amount of time be accorded by licensees to the other side, namely, that people should not smoke cigarettes since cigarette smoking may be dangerous to their health. The Fairness Doctrine does not require, as petitioners seem to suppose, that each reason for or against the basic issue be debated in a series of answers and replies.

The far more serious and significant problem (i.e., more serious and significant than petitioners' claim of unfairness) is the fact that without the Fairness Doctrine the public, and particularly the children and youth of this country, have been and will be exposed to over two hundred million dollars (\$200,000,000) worth of commercials

annually that portray cigarette smoking, without contradiction, as everything but the panacea for all of their problems. The public has been and is told over and over again that cigarette smoking is "good", "great", "real", "true", "rewarding", "satisfying" and that cigarette smokers are "successful", "important", "exclusive", "discriminating", "attractive", "socially acceptable", "manly", "wholesome" and lead a "rich full life." To say as petitioners now try to do that advertisements do not convey to the listeners and viewers the message that cigarette smoking is perfectly safe and not harmful is purely specious. No other conclusion may be reached.

If the public is to be inundated with more than two hundred million dollars (\$200,000,000) worth of such advertisements over the airwaves annually on why they should smoke, it is certainly fair and reasonable to hold that the public interest requires that a significant amount of time be devoted to the opposing view that potential hazards may be involved in accepting such thesis.

The FCC's regulation after all, as pointed out above, is not imposed on the cigarette manufacturers or advertisers; it is imposed upon licensees who in return for the privilege of using the public airwaves are charged with a public trust and who are "mandated to operate in the public interest" with "the obligation of presenting public questions fairly and without bias". Viewed in this perspective, fairness dictates that the public having been well exposed to the case for smoking over its airwaves, be given at least some exposure to the risks that may be involved therein. It does not require further that medical opinions on various aspects of the problem *pro* and *con* be set forth seriatim thereafter. The truth or falsity of the medical claims is not the question, which is only that the public be adequately made aware of the possible enjoyment on the one hand and the possible risk on the other.

Petitioners' "parade of horrors" on this point is not persuasive. The automobile, for example, concededly, may

very well be an equally deadly killer. Apart from the necessity of its use, the public is not unaware of the risks attendant thereon. There is scarcely a weekend and certainly no holiday weekend when for news purposes or otherwise the broadcasters do not blare forth and repeat innumerable times the latest highway death toll figures. No such publicity is accorded to the ever rising death toll from emphysema, bronchitis and other respiratory diseases. However, and in any event, two wrongs do not make a right and if the Fairness Doctrine should be made applicable to other advertisements, such action should be taken.

POINT III

The application of the Fairness Doctrine to licensees carrying cigarette advertisements is reasonable and not violative of the Constitution.

Petitioners' arguments that the FCC's ruling is "in excess of statutory authority", "an abuse of discretion", "arbitrary", "capricious" and violative of the "First, Fifth or Ninth Amendments to the Constitution", are difficult to fathom in view of this Court's recent opinion in *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 381 F. 2d 908 (1967), and the facts herein.

Had the FCC ruled that broadcast licensees could no longer carry cigarette advertisements on the ground that the same contravened their obligation to operate in the "public interest" or limited the quantity of such advertisements or even restricted the hours thereof, petitioners might have some tenable basis for their claims, but as the matter stands it is quite apparent that the FCC's imposition of the Fairness Doctrine was well within its statutory authority (*Red Lion* at pp. 920-922), did not contravene the First, Fifth or Ninth Amendments to the Constitution (*id.* at pp. 922-930) and, far from being "arbitrary" or

"capricious" was most reasonable and fair to the petitioners herein.

Petitioners, particularly the petitioning broadcast licensees, forget that their broadcasts are directed to and heard by the public at large, including, in particular, children of all ages.

'First Amendment freedoms' have been curtailed by the courts recently when minors have been involved (e.g., in the case of literature, movies, theatre, etc., where obscenity, nudity, etc., were involved. See: *Bookcase, Inc. v. Broderick*, 18 N. Y. 2d 71 (1966), app. dism'd 385 U. S. 12, 943 (1966), and cases cited therein) and the situation in the case at bar is no different. Indeed, it is submitted that it would have been well within the FCC's authority, in the best interests of the public and most reasonable for the FCC to have restricted and limited the hours in which cigarette commercials could have been shown as well as the total amount of time available for such purpose so as to cut down severely the number of minors who would normally watch the same.

As the FCC points out in its opinion, advertising enjoys less protection under the First Amendment than does other speech (*Murdock v. Pennsylvania*, 319 U. S. 105, 110-111 (1943); *Valentine v. Chrestenson*, 316 U. S. 52-54 (1942); *Martin v. Struthers*, 319 U. S. 141, 142 (1943), note 1; *Beard v. Alexandria*, 341 U. S. 622, 641-643 (1951) and the Commission's power to regulate it is accordingly broader than it is with respect to programming. *Head v. New Mexico Board of Examiners*, 374 U. S. 424, 430-431, 437-441 (1963), and cf. *Farmers Union v. WDAY*, 360 U. S. 525, 529-530 (1959); *Henry v. Federal Communications Commission*, 302 F. 2d 191, 194 (C.A.D.C., 1962) cert. den. 371 U. S. 821 (1962).

The public in general, and the NTA in particular, has a vital interest in safeguarding American children and youth by minimizing their exposure to the blandishments and inducements of cigarette advertising or, at the very least, insuring them the fullest possible education on the hazards

of smoking. Anything less borders on a license to use public facilities (the airwaves) for the purpose of inducing the youth of our nation to the path of potential self-destruction.

In light of the scope of the FCC's true authority in the premises and the actual action taken by it, we submit the petitioners should be most grateful. Abolition of cigarette advertising from the airwaves (just as obscenity and nudity have been abolished therefrom) would have served well, and been well within, the public interest and no more violative of the Constitution than such other abolitions.

• • •

Such procedural defects, if any, as might have attached to the FCC's original ruling dated June 2, 1967 (R. 15-17), were clearly cured by the opportunities given the petitioners to submit their arguments, the careful consideration given thereto and the prospective (rather than retroactive) effect of its September 8, 1967 decision from which the appeals herein have been taken.

CONCLUSION

The Federal Communications Commission's decision should be affirmed.

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BRIEF FOR PETITIONERS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,525, 21,526

255

**WTRF-TV, Inc.,
and**

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioners,*

v.

**FEDERAL COMMUNICATIONS COMMISSION
and**

UNITED STATES OF AMERICA, *Respondents.*

**On Petitions To Review Orders of the
Federal Communications Commission**

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**United States Court of Appeals
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FILED MAR 8 1968

Noted

CLERK

QUESTIONS PRESENTED

The parties have stipulated that the following questions are presented in these proceedings:

“The Federal Communications Commission has ruled that radio and television stations that broadcast any cigarette commercials must broadcast on a regular basis material presenting the viewpoint that cigarette smoking may be a hazard to the smoker’s health. The issues presented by this ruling are:

“1. Whether this ruling is precluded by reason of the Federal Cigarette Labeling and Advertising Act and the congressional purposes and findings that underlie this statute.

“2. Whether the Commission’s ruling contravenes the First, Fifth or Ninth Amendments to the Constitution.

“3. Whether this ruling is in excess of the Commission’s statutory authority, constitutes an abuse of discretion, is arbitrary or capricious or is otherwise unlawful.

“4. Whether, in adopting this ruling, the Commission observed the procedures required by law.

“5. Whether, if the ruling is otherwise valid, the Commission erred in ruling further that licensees who broadcast cigarette commercials and who grant a significant amount of time to spokesmen for the view that smoking may be hazardous are not obligated to grant reply time to cigarette manufacturers.”

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,525, 21,526

WTRF-TV, Inc.,
and
NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA, *Respondents*.

**On Petitions To Review Orders of the
Federal Communications Commission**

BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

These cases were filed on September 13, 1967, in the United States Court of Appeals for the Fourth Circuit to review two orders of the Federal Communications Commission (FCC): a ruling of June 2, 1967, and a Memorandum Opinion and Order adopted on September 8, 1967, and released on September 13, 1967, in which the FCC, on reconsideration, affirmed the June 2 ruling. That Court's jurisdiction was based on Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), Section 2 of the Judicial Review Act of 1950, 28 U.S.C.

§ 2342, Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06, and 28 U.S.C. § 2112.

On December 18, 1967, the Court of Appeals for the Fourth Circuit, pursuant to 28 U.S.C. § 2112, transferred these cases to this Court, where there was pending a petition to review these same orders. (No. 21,285, filed September 9, 1967). This Court has jurisdiction over these cases under the provisions cited above.

STATEMENT OF THE CASE

The petitioner National Association of Broadcasters (NAB) is a nonprofit organization of radio and television broadcasters whose membership, as of January 10, 1968, included 2,177 AM stations, 1,127 FM stations, 519 television stations, and all the radio and television networks. The petitioner WTRF-TV, Inc., is an individual broadcaster licensee. Three of the networks and certain other individual broadcaster licensees have intervened in support of the petitions. Also intervening in general support of the petitions are certain cigarette manufacturers and a trade association of such manufacturers.

The FCC's Ruling

The petitions request this Court to review and to reverse a ruling by the FCC that each licensed TV and radio broadcaster who carries cigarette commercials is obligated "to devote a significant amount of time to informing his listeners" that cigarette smoking is "a habit which may cause or contribute to the earlier death of the user." (R. 855-56). The ruling, rendered in an opinion that was mailed to all broadcasters, applies to cigarette commercials broadcast after September 15, 1967, the publication date of the ruling. 32 Fed. Reg. 13162.

The ruling appears in the penultimate paragraph of the opinion. (Par. 64 (R. 855-56); see also Par. 14 (R. 822-

23)). While that paragraph states this newly created broadcaster's obligation only in general terms, passages in the course of the opinion, variously phrased, may provide specificity as follows:

1. The time to be devoted by a broadcaster to warnings of the asserted cigarette health hazard, though it need not be equal to the time taken by cigarette commercials, must be "significant" not only in total amount but also in regularity. The opinion seems to say that the amount of time must be significant "each week"¹ and that within each week it must be provided not in a single period but repetitively. (R. 845).

2. The required health warnings can be provided in whole or in part by responsible spokesmen other than the broadcaster. (R. 844-45). If time is provided to such other persons, they may pay the broadcaster for it if they wish, but payment cannot be required. (See pp. 14-15, *infra*).

3. The opinion appears to mean that even if a broadcaster makes a good faith effort to find responsible spokesmen to warn of the asserted health hazard, but fails, he is not excused from meeting the requirement. He himself must do so. (R. 823, 824, 838, 846, 855-56).

4. Broadcasters of cigarette commercials are required to air only one side of the cigarette health issue, that smoking may be hazardous. Though the FCC recognizes that cigarette commercials may not make any health claims (R. 825, 841-42), the broadcaster thereof is not required to devote time to informing his listeners that cigarette smoking may *not* be hazardous. (See pp. 19-20, *infra*).

¹ Paragraphs 3 and 39 of the opinion so state. (R. 815, 843). Paragraph 41, however, states that what is required is "presentation of the opposing viewpoint on a regular basis (e.g., each week)" (R. 844); paragraph 43 requires "a significant amount of time each week, absent unusual circumstances" (R. 845); and paragraph 56 states that "a sufficient amount of time must be allocated, usually each week. . . ." (R. 851).

The Issue

The issue presented is whether the FCC can require the broadcaster of cigarette commercials which do not themselves deal with the health issue to warn his listeners of the alleged health hazard of cigarette smoking.

The issue can be broken down into two questions.

The first question is whether the power assumed by the FCC exists or can be exercised prior to July 1, 1969, in light of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. §§ 1331-39 (Cigarette Labeling Act). In that Act Congress provided a "comprehensive Federal program" to deal, until July 1969, with the problem of adequately warning the public of any cigarette health hazard. The congressional program included no provision for this newly adopted FCC regulation of the subject. On the contrary, it was adopted with the understanding that there would be no FCC regulation.

The second question is whether, apart from the Cigarette Labeling Act, the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151 *et seq.*, empowers the FCC to regulate cigarette advertising in the manner it has determined and, if so, whether such regulation is constitutional.

The Facts

There is no factual record. What happened is this:

On January 5, 1967, Mr. John F. Banzhaf, III, a member of the TV listening public in New York City, wrote a letter to the FCC stating that WCBS-TV, an FCC licensee in New York City, regularly broadcast TV cigarette commercials, and referring to three such commercials it had broadcast on a recent date; that he had written to WCBS-TV seeking for "responsible spokesmen" (he contended that he himself was such a spokesman) free time, approximately equal to that taken by cigarette commercials, to broadcast warning of the cigarette health hazard; but that

WCBS-TV had refused to give such an opportunity, saying in reply that in the recent past it had broadcast numerous programs on the cigarette health issue, including messages by the American Cancer Society opposed to smoking. (R. 1-2). Mr. Banzhaf's letter to the FCC enclosed copies of correspondence between him and WCBS-TV. His letters to WCBS-TV contended that the FCC's so-called Fairness Doctrine required that station to provide his requested time. (R. 3-5). A letter from WCBS-TV to Mr. Banzhaf contended that its coverage of the cigarette health issue had been both fair and objective and therefore fully consistent with the Fairness Doctrine, and that that Doctrine was not "a vehicle for giving the Commission power to indirectly regulate product advertising when other governmental agencies are directly charged with the regulatory responsibility over such advertising." (R. 6, 8).

WCBS-TV was not notified of Mr. Banzhaf's letter to the FCC until June 2, 1967. On that date the FCC wrote the station, summarizing Mr. Banzhaf's letter to it, and informing the station that the Fairness Doctrine is applicable to cigarette commercials and that therefore "a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health." Its letter stated that it rejected Mr. Banzhaf's claim to equal time but that "each week" the station should allocate "sufficient time" to "the viewpoint of the health hazard posed by smoking." (R. 15-17).

The FCC's letter to WCBS-TV was publicly released. Thereafter, petitions for reconsideration of this letter ruling were filed by, among others, the petitioner NAB (R. 443-58), numerous broadcasters (including the petitioner WTRF-TV, Inc., (R. 278-89, 303)), the three intervenor networks (R. 246-57, 403-20, 422-26), and the intervenor cigarette manufacturers and trade association. (R. 353-66). Among other contentions in these petitions,

it was urged that the FCC could deal with the question, if at all, only by meeting the rule-making procedural requirements of the Administrative Procedure Act, which, of course, had not been complied with. (See R. 168-201).

One of the petitions set forth the text of the three cigarette commercials to which Mr. Banzhaf had referred. They seem to be typical—somewhat whimsically suggesting that smoking is pleasurable. They made no claim that cigarette smoking is not a health hazard. (R. 416-20).

In general the petitions argued, *inter alia*, that the FCC had no power to impose the requirement adopted in its letter ruling; that the Fairness Doctrine does not apply to product advertising as such; and that in any case the FCC's requirement is precluded by the Cigarette Labeling Act.

Thereafter, the FCC issued its ruling and opinion on reconsideration. It declined to conduct an APA rule-making proceeding. (R. 852). The opinion greatly elaborates, and refines, its June 2 letter ruling, but makes its requirement applicable only from the publication date of the opinion instead of the date of the letter ruling. (R. 816-17, 852). The ruling was made applicable to all broadcasters; it had no special application to WCBS-TV and what that station had done or had not done became quite irrelevant. Indeed, the FCC disclaimed any concern with the content of any particular cigarette commercials and evinced no interest in the text of the commercials that occasioned Mr. Banzhaf's original letter. (R. 851, n. 30). (Mr. Banzhaf himself had not informed the FCC of the contents of those commercials.)

The FCC made no fact findings, evidentiary or otherwise, and applied no special broadcasting expertise. Its ruling reflected no more than the common information and layman's judgment possessed as fully by members of Congress or a knowledgeable member of the general public as by the FCC.

The Fairness Doctrine

The FCC purports to base its ruling on its Fairness Doctrine. Since its opinion does not set forth that Doctrine in detail, but invokes it largely by reference, it is necessary to a statement of this case that the Doctrine be explained.

The FCC adopted the Fairness Doctrine in 1949 in its report, *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246. In that report it overruled a decision rendered in 1941 which had forbade broadcast licensees to editorialize—that is to broadcast any advocacy by the licensee itself of any position, pro or con, on any public issue. *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1941).

The ban on broadcaster advocacy—strange in view of the explicit prohibition in the Act of any FCC censorship²—had been adopted by the FCC on the theory that its broadcasters had an obligation to operate in the public interest and that it was contrary to that interest for them to endeavor to impose their own views on their listeners.

The public interest obligation was not stated at that time in so many words in the Act. It was constructed by the FCC from the licensing provisions of the Act. Those provisions prohibit any broadcasting by any person unless he has been licensed by the FCC. § 301, 48 Stat. 1081 (1934), 47 U.S.C. § 301. Licenses can be issued or renewed for a period of no more than three years. § 307(d), 48 Stat. 1083 (1934), as amended, 47 U.S.C. § 307(d). The statutory standard to be applied by the FCC in the exercise of its licensing function—whether for initial licensing or

²Section 326 of the Communications Act, 48 Stat. 1091 (1934), as amended, 47 U.S.C. § 326, provides:

“Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”

This same prohibition of censorship was contained also in the predecessor Radio Act of 1927, § 29, 44 Stat. 1172.

for periodical renewals of licenses—is “the public interest, convenience, and necessity.”³

The FCC has interpreted this brief statutory phrase as calling upon it to demand that applicants for initial licenses show that their proposed programs would serve the public well. In various ways, by decisions in particular cases and otherwise, the FCC has evolved criteria defining minimum requirements generally to be met by an applicant’s proposed programming. *E.g.*, *Programming Policy*, 20 P & F Radio Reg. 1901 (1960). Criteria were also developed for license renewal applications. *Ibid.* But in the case of renewals, defects in a licensee’s past performance would weigh against a decision to grant renewal, or would dictate, perhaps, a probationary renewal for a term shorter than the statutory three-year maximum.

It is this power respecting license renewals that was used to impose an effective obligation on a licensee to operate in a manner the FCC felt was in the public interest. For the licensee knew that, if its day-to-day operations did not comport with the public interest, it would risk what it could not afford: either refusal of renewal or, at best, a short-term renewal.⁴ And in view of the extreme lengths to which the courts have gone in restraining their review of administrative judgment, especially in matters of licensing, the possibility of judicial review is but the

³ See § 309(a) of the Communications Act, 48 Stat. 1065 (1934), as amended, 74 Stat. 889 (1960), 47 U.S.C. § 309(a), which provides:

“Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies [i.e., applications for “construction permits and station licenses, or modification or renewals thereof”], whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission . . . shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.”

⁴ A short-term renewal is a substantial “black mark” against the licensee, placing it on probation, with very close scrutiny of its operations by the FCC, during the renewal period. A renewal for less than the normal three-year period may also be viewed by those anxious to use the facility as an invitation to file an application for it with the hope that that application will be held by the FCC to prevail over the renewal application. See WHDH, Inc., 25 P & F Radio Reg. 80 (1962).

scantest curb on FCC renewal determinations. Hence the law-in-action became as though the law-in-the-books had stated, "A licensee shall operate in accordance with the FCC's views of what is in the public interest."

This bears emphasis. Other media of expression and entertainment—e.g., the newspaper or the theatre—can be vigorously independent of the views of Government as to what is "good" for the people. But the broadcaster, faced with Government's power to decree life or death for his enterprise at a maximum of every three years, with judicial review a gamble against longest odds, does not have the same independence. The views—even the hinted views—of the FCC are prevailing to such a degree that its power, practically speaking, is what has become known as the power to regulate by the lifted eyebrow.⁵

When, in its *Report on Editorializing*, the FCC reversed its previous position that its licensees could not broadcast their own views on issues of the day, its opinion explored at length the public interest obligation of the broadcaster. It held that, in a democracy, the public must be fully informed on controversial issues of public concern; that full information requires that the public be fairly exposed to all sides of such issues; that broadcasting is a vitally important means for informing the public; that each broadcaster has the obligation to devote significant portions of broadcasting time to informing the public on such issues; and that this obligation can be discharged only by the broadcaster's providing an opportunity for various sides of such issues to be presented to his listeners. 13 F.C.C. at 1249-50. The broadcaster can determine how this will be done. Thus he can present objective exposition of all sides, or he can have different sides presented by advocates, or the broadcaster himself can advocate (or editorialize)

⁵ See Miami Broadcasting Co. (WQAM), 14 P & F Radio Reg. 125, 128 (1956) (Commissioner Doerfer dissenting); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67, 118-21 (1967); 23 U. of Pitt. L. Rev. 157, 170 (1961).

one side and have the other sides presented by others, or he can adopt some other format. 13 F.C.C. at 1250.

This is the Fairness Doctrine. Newly enunciated in 1949, it became a critical item in the FCC's regulation of broadcasters' programming.

The *Report on Editorializing* was at pains to profess that the honest judgment of the broadcaster will not be penalized. The profession, that is to say, was that the FCC will not impose its own ideas respecting matters such as what is a public issue, or what should be done to find responsible spokesmen for various sides of such an issue, or what would be a fair opportunity for the presentation of each side. Rather the Report professed that the broadcaster himself will be allowed to determine all such matters and his determination will be accepted if only it is "honest." "[A]n honest mistake or error in judgment on the part of a licensee" will not be "condemned" where "his overall record demonstrates a reasonable effort to provide a balanced presentation of comment and opinion on such [public] issues." 13 F.C.C. at 1255. The Report went quite far in assurance that the FCC will not interfere with "honest" programming efforts in this area. It said:

"Of course, some cases will be clearer than others, and the Commission in the exercise of its functions may be called upon to weigh conflicting evidence to determine whether the licensee has or has not made reasonable efforts to present a fair and well-rounded presentation of particular public issues. But the standard of reasonableness and the reasonable approximation of a statutory norm is not an arbitrary standard incapable of administrative or judicial determination, but, on the contrary, one of the basic standards of conduct in numerous fields of Anglo-American law." 13 F.C.C. at 1256.

This seems to say that, where judgments of reasonable men might differ on the resolution of any of the questions presented by implementation of the Fairness Doctrine, the

judgment of the broadcaster, not that of the FCC, will prevail if within that zone of reasonableness. Surely that is what is referred to as "one of the basic standards of conduct in numerous fields of Anglo-American law."

A few years after the enunciation of this Doctrine, Congress adopted an amendment to the Act that has been construed by the FCC as a ratification of the Doctrine. The amendment, adopted in 1959, made a change in Section 315(a) of the Act.

That section, like one in the original Radio Act of 1927, § 18, 44 Stat. 1170, had provided that if a broadcaster allowed a candidate for public office to "use" his station he was obligated to afford "equal opportunities" for such use by each other bona fide candidate for the same office. This has become known as the "equal time" provision.

During a primary campaign for the mayoralty of Chicago in 1959, the *Lar Daly* case arose. *CBS, Inc.*, 18 P & F Radio Reg. 238, *aff'd on reconsideration*, 26 F.C.C. 715. A Chicago TV station carried some news programs in the course of which there were very brief shots of Mayor Daley (who was running for renomination) discharging certain civic duties—meeting some distinguished visitors, etc. He was not shown campaigning; the shots were such as might appear in normal course in the reporting of a city's news. A minor candidate for nomination to the office of mayor—one Lar Daly—insisted that this was a "use" of the station by candidate Mayor Daley, that he, Lar Daly, also was a bona fide candidate, and that therefore he was entitled to appear for an equal time on the station's program to advance his own candidacy. The FCC agreed.

This ruling effectively clogged normal news reporting during election campaigns. Congress had to undo the ruling. Accordingly, Congress amended Section 315(a) by adding a sentence providing that its "equal time" requirement would not apply to ordinary news broadcasts. But

to make it clear that the amendment was intended to do no more than simply undo the *Lar Daly* ruling, Congress included in the amendment a second sentence as follows:

"Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 73 Stat. 557.

Since this sentence referred to "the obligation" imposed by the entire Act—not just by Section 315—and since it was enacted by Congress subsequent to the 1949 *Report on Editorializing* where the FCC had adopted its Fairness Doctrine, the FCC has construed this sentence to mean that Congress thereby ratified the principle that a broadcaster is obligated "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."⁶

Five years after this amendment to Section 315, the FCC published in the Federal Register what has since been called its *Fairness Primer*. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964). This was done in order "to advise broadcast licensees and members of the public of the rights, obligations, and responsibilities of such licensees under the Commission's 'fairness doctrine'" *Id.* at 10416. The *Primer* set forth a digest of the Commission's rulings under the Fairness Doctrine.

The digest was preceded by an introductory discussion. This introduction noted that the Fairness Doctrine had

⁶ The validity of this FCC construction of the 1950 amendment to § 315 as a codification of the Fairness Doctrine is, however, open to serious question, as indicated in a recent study of the Doctrine by the staff of a congressional committee. See *Legislative History of the Fairness Doctrine*, Staff Study, House Interstate and Foreign Commerce Committee, 90th Cong., 2d Sess. (1968).

been adopted in the 1949 *Report on Editorializing* and that Congress had "recognized" the Doctrine in its 1959 amendment to Section 315 (in the sentence quoted above). It differentiated between the "equal time" requirement of Section 315, applicable to candidates for office, and the Fairness Doctrine. The former, it noted, is a specific and very limited requirement. The latter is broader and "does not apply with the precision" of the "equal time" requirement. As to the latter, the FCC reiterated essentially what it had said in its *Report on Editorializing* when it had adopted the Anglo-American "reasonable man" standard. It said:

"... the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith." 29 Fed. Reg. at 10416. (Emphasis added).

The technique of enforcement of the Fairness Doctrine is an FCC innovation, quite unknown to the Administrative Procedure Act and never stated even in the FCC's own procedural regulations.

Anyone can write a letter to the FCC requesting its ruling on any question as to whether, in given circumstances, a broadcaster is complying with the Doctrine. Such a letter can be a so-called "complaint" from a listener or from someone who wants to be heard on the broadcaster's station, or it can be a request for a ruling from a perplexed broadcaster. If the FCC thinks the letter worthy of consideration, it will respond with a ruling on the question

in a letter or even a telegraphic communication to the broadcaster concerned. In the case of a "complaint" it professes to give an opportunity to the broadcaster to answer the "complaint" before the FCC issues its ruling (*Fairness Primer*, 29 Fed. Reg. at 10416)—although it did not bother to do this in the case of Mr. Banzhaf and WOBS-TV.

When a broadcaster receives such a "ruling," he can conduct himself in a manner contrary thereto only at his peril when the time comes for renewal of his license. And sometimes the FCC's ruling will be reproduced in a public release. In such a case all broadcasters—not just the broadcaster who is the subject of the ruling—can act contrary thereto only at their peril. Such a peril—as we have seen (*supra*, pp. 8-9)—is so grave a risk that a broadcaster has no choice save to comply with the ruling or immediately to seek judicial review.⁷

These rulings are issued in compliance neither with the adjudicative nor with the rule-making procedures prescribed by the Administrative Procedure Act. The case of the broadcaster immediately concerned is not the subject of an APA adjudicative hearing. And although all broadcasters are directly affected if the ruling is publicly released, there is no APA rule-making proceeding.⁸

The Fairness Doctrine, it will be observed, has direct impact on the broadcaster's revenues. Under the "equal time" provision of Section 315, dealing with appearances of candidates for office, it is provided that, if a broadcaster

⁷ This Court, *en banc* but without discussion of the point, has overruled a decision by one of its panels that such a ruling is not ripe for review at that point. See *Red Lion Broadcasting Co. v. FCC*, — U.S. App. D.C. —, —, 381 F.2d 908, 910, cert. granted, 389 U.S. 968 (1967).

⁸ There has been one exception. Recently after a rule-making proceeding the FCC adopted a regulation dealing with a limited segment of the area covered by the Fairness Doctrine—the personal attack and candidate endorsement area. This regulation is now pending review in the Seventh Circuit. *Fairness Doctrine Rules*, 10 P. & F. Radio Reg.2d 1901 (1967), appeal pending, *Radio Television News Directors Ass'n v. FCC* (Nos. 16369, 16498, 16499, 7th Cir.).

charges one candidate for the use of his station, he must charge all candidates. But under the Fairness Doctrine the FCC rules that, if a broadcaster allows one side of a public issue to be presented on a sponsored basis, he cannot refuse to carry the contrasting viewpoint because of an inability to secure paid sponsorship for it. *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963); *Fairness Primer*, 29 Fed. Reg. at 10419-20. Read

The broadcaster's interest, then, in the FCC's expansion of the Doctrine is not academic. Both his programming freedom and his sustenance are directly affected.

The Reasoning of the FCC's Opinion

In the petitions for reconsideration of the FCC's June 2, 1967, letter ruling to WCBS-TV, it was urged that the Fairness Doctrine is not applicable to the case because cigarette commercials do not in fact present one side of the controversial cigarette health issue. They do not and cannot make any health claims. Federal Trade Commission (FTC) regulation long ago outlawed such claims in cigarette advertising. This prohibition, moreover, is re-enforced by self-regulation under advertising codes both of the cigarette industry and of broadcasting. 1.

It was urged also that the Fairness Doctrine is not properly applicable to mere product advertising. The regulation of such advertising is a function of the FTC under Section 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45, with, at most, only certain supplementary jurisdiction reposing in the FCC. The Fairness Doctrine deals with something quite different—the programming of discussion of public issues. 2.

It was urged likewise that in any case the FCC's regulation of cigarette advertising by application thereto of the Fairness Doctrine is not permissible in light of the Cigarette Labeling Act. That Act was adopted in 1965 after full hearings on the whole cigarette health issue and its 3.

relation to cigarette advertising. The Act provides that all cigarette packages should carry a health hazard warning. It provides further that, in view of this requirement, neither the FTC nor any other Federal or state agency should be empowered to impose any additional requirement, prior to July 1, 1969, as to warnings of any health hazard. The Act also calls on the FTC and the Department of Health, Education, and Welfare (HEW) to report to Congress periodically on the matter so that, prior to July 1, 1969, Congress could determine what should be done thereafter.

The petitions for reconsideration urged that it would be inconsistent with this congressional action for the FCC, during the moratorium period prescribed by Congress, to adopt the proposed regulation of cigarette commercials.

With these and other arguments the FCC's opinion deals at length.

It disposes of the Cigarette Labeling Act by holding that the congressional moratorium applies only to the requirement of health warnings "in" cigarette advertising; it deemed itself free, therefore, to require the broadcaster to warn his listeners of the asserted health hazard elsewhere in its programming than "in" the cigarette commercials themselves. (R. 825-26, 829-30). (Paradoxically, however, despite its reliance on the word "in," the FCC acknowledges that that Act prevents it from requiring that health warnings be "adjacent to" the cigarette commercials or that the same amount of time be given to such warnings as is devoted to cigarette commercials.) (R. 830). The FCC goes on to argue that since, in connection with its adoption of the Cigarette Labeling Act, Congress had indicated its desire to encourage the education of the public on the asserted health hazard, it is consistent with the Act to compel broadcasters of cigarette commercials to "implement" such an educational effort by application of the Fairness Doctrine to such commercials. (R. 830).

West

The FCC also discusses what it considers to be the viewpoint on a controversial issue that is expressed in cigarette commercials. It admits that cigarette commercials do not contain any "health claim . . . or affirmative discussion of the health issue." (R. 838). But says the FCC, it could not accept the argument that therefore "there is no viewpoint to oppose." The FCC did not itself examine any cigarette commercials, but it relied on a description thereof by the FTC in the first of its reports to Congress pursuant to the Cigarette Labeling Act, which had been made on June 30, 1967. The FCC says that this report "amply documents" the FTC's conclusion that cigarette commercials, by portraying "the satisfactions engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences," convey the impression "that smoking carries relatively little risk." The FCC notes that this FTC conclusion is the same as that reached by that agency in 1964, when the Cigarette Labeling Act was under consideration by Congress. (R. 838).

As to the propriety of applying the Fairness Doctrine, the opinion states its conclusion in its penultimate paragraph 64 as follows:

"There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of 'horrible' extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty 'to operate in the public interest' (§ 315(a)), is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the Legislative history of the Cigarette Labelling Act, that question is one reserved for judgment of the Congress upon the

basis of the studies and reports submitted to it (except, of course, for whatever voluntary judgment the broadcasting industry might now make). But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.” (R. 855-56).

As the FCC says in this paragraph, its position really is very simple. It states that the Government has determined that cigarettes are “a serious potential hazard to public health.” It recognizes that “ordinarily” the question would be whether cigarette commercials could be carried at all by a broadcaster consistent with his “obligation to operate in the public interest.” But to prohibit broadcasting of cigarette commercials, it is admitted, would be contrary to the Cigarette Labeling Act; the legislative history of that Act shows that Congress had reserved to itself the determination of whether cigarette commercials shall be permitted, a determination to be made prior to July 1, 1969, in light of the reports to be submitted to it by the FTC and HEW in the meantime. In view of this congressional preemption, the FCC will stop short of a prohibition of cigarette commercials and, instead, will impose on a broadcaster thereof the requirement that he broadcast counterbalancing health warnings. This treatment “stems not from any esoteric requirements of a particular doctrine” or from “the specifics of the Fairness Doctrine” but “from the simple fact that it is in “the public interest.””

Constitutional objections that had been urged in the petitions to reconsider were brushed aside on the ground that “advertising . . . enjoys less protection than other

speech" and that the FCC's "power to regulate advertising by radio may, indeed, be broader than it is with respect to programming." (R. 818, n. 4).

That the FCC indeed intended its ruling to go far beyond "the specifics of the Fairness Doctrine" as it had been formulated in the *Report on Editorializing* and allegedly ratified in Section 315 of the Act is demonstrated finally by a significant sequel to the issuance of the opinion.

Since cigarette commercials are not allowed to claim that cigarette smoking may not be hazardous or that in some respects it even may be beneficial to health—despite responsible medical opinion to that effect⁹—the FCC's opinion, emphasizing "fairness," recognized that it would be unfair merely to require that upon the broadcasting of such commercials a broadcaster had to air claims as to the hazard of cigarette smoking. For then only one side of the controversial cigarette health issue would be presented—violating the very essence of the requirement, allegedly confirmed in Section 315, that there be "reasonable opportunity for the discussion of conflicting views." The FCC's opinion held:

"We see no inequity in the circumstance that cigarette advertisers are precluded by various codes from making affirmative health claims in the advertising programming. [Footnote omitted.] The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials." (R. 841-42).

Thus was Fairness provided for.

But two weeks after adopting its opinion, the FCC issued a "clarification." In response to a query from a broadcaster, it determined that the second of the two

⁹ See *Smoking and Health*, Report of the Advisory Committee to the Surgeon General of the Public Health Service, 355-56 (1964) (Advisory Committee Report).

sentences quoted above states the FCC's position "inaptly and is withdrawn." (R. 881). Thus the opinion, as "clarified," leaves hanging without support an assertion that there is "no inequity" in a ruling that now requires broadcasters of cigarette commercials to air only one side of the cigarette health issue.

Such one-sidedness flaunts the basic premise of the Fairness Doctrine as heretofore stated. It must be concluded that the FCC, in adapting that Doctrine to the regulation of advertising, means that it can require the broadcaster to inform his listeners concerning products advertised on his station, without regard to what the advertisements say, at least in the case of products of public concern. This can be required, says the FCC, because of "the simple fact" that it is in "the public interest." And in this instance the information is to be one-sided.

STATUTES INVOLVED

Set out in the Appendix hereto are the provisions of Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 73 Stat. 557 (1959), 47 U.S.C. § 315(a), and of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. §§ 1331-39.

STATEMENT OF POINTS

1. The FCC's ruling that broadcasters who carry cigarette commercials must also present on a regular basis warnings as to the asserted hazard of cigarette smoking is barred by the Federal Cigarette Labeling and Advertising Act and, by reason of the purpose manifested in that Act, is contrary to the "public interest."

2. Without regard to the Cigarette Labeling Act, the ruling is beyond the FCC's power. For both statutory and constitutional reasons, the ruling cannot be upheld on the basis of the Fairness Doctrine. Nor can it be upheld as an *ad hoc* regulation of advertising.

SUMMARY OF ARGUMENT**I.**

The FCC's regulation of cigarette advertising in this case is unlawful in light of the 1965 Cigarette Labeling Act. In adopting that Act, Congress determined that it, and it alone, would decide what governmental action should be taken to require health warnings with respect to cigarette labeling and advertising. In view of the importance and magnitude of the health and economic implications, Congress determined that such regulation by the states or by any administrative agency was not appropriate. The FCC, along with all other Federal agencies and the states, thus was relieved of any otherwise existing authority to regulate cigarette labeling and advertising in order to inform the public of the asserted hazards of smoking.

The Cigarette Labeling Act also involved a congressional determination that the regulation there imposed—the warning on cigarette packages—is adequate to inform the public and that anything further is not warranted at this time. That conclusion, moreover, was reached after full consideration by Congress of the view, then expressed by the FTC and now espoused by the FCC, that cigarette advertisements implied that cigarette smoking is not harmful. Congress either rejected that view or determined that it did not warrant more than the remedial measure adopted in the statute. In either event, the FCC's health warning requirement cannot square with the congressional determination.

Finally, because of the Cigarette Labeling Act, the FCC's ruling does not comply with the "public interest" standard of the Communications Act. That standard must be read in light of the purpose expressed in the Cigarette Labeling Act and the congressional determinations that underlie it. The FCC must respect these determinations, especially since, when that Act was being considered, the FCC informed Congress that it proposed no independent action

with respect to broadcast cigarette advertising, that such advertising should not be specially regulated but should be subject only to across-the-board treatment of cigarette advertising in all media. After receiving these views, Congress enacted a "comprehensive program" with no provision for any FCC responsibility with respect to cigarette advertising. The FCC cannot now legitimately assert—contrary to the views it expressed to Congress—that its "public interest" power entitles it to assume a major regulatory role in this delicate area.

II.

Nor is the FCC's ruling within its authority under the Communications Act even if that statute is read without regard to the Cigarette Labeling Act.

1. The Fairness Doctrine cannot support the ruling. That Doctrine incorporates a standard of "reasonableness"—the broadcaster's judgment is to be upheld, so the FCC repeatedly has emphasized, if reasonable and in good faith, and the FCC is not to substitute its judgment for that of the broadcaster on any programming decision under that Doctrine.

In this case, however, the FCC applied a completely different standard, ruling that *the FCC* did not abuse its discretion in holding that the Fairness Doctrine requires the broadcaster of cigarette commercials to carry cigarette health warnings. This reversal of the "reasonableness" standard, if not struck down by this Court, will give the FCC the power to apply the Fairness Doctrine to nearly every conceivable type of programming, as it alone sees fit, with judicial review rendered almost meaningless.

The FCC violates the proper boundaries of the Fairness Doctrine in other important respects. The FCC here applies the Doctrine to what at most can be an implicit raising of a controversial issue, states that a controversial health issue is different from other types of controversial

issues under the Fairness Doctrine, and relies on the fact that the Government has spoken on an issue as justifying its special treatment—all contrary to the FCC's previous application of the Fairness Doctrine. When clarifying its opinion, moreover, the FCC departed from the basic premise of the Fairness Doctrine, for its ruling now requires only one side of the cigarette health issue to be aired.

The FCC's need to gerrymander the Fairness Doctrine in this case is itself persuasive evidence that that Doctrine has no proper role to play in connection with routine, traditional product advertising. The language of Section 315 of the Act and the nature and function of product advertising call for rejection of the FCC's attempt in this case to apply the Doctrine to ordinary advertising not containing any genuine discussion of a public issue.

If, however, the FCC is right that cigarette advertising amounts to "discussion" of a controversial public issue and hence triggers the Fairness Doctrine, then constitutional questions under the First and Fifth Amendments must be faced, questions that are not answered by this Court's holding in *Red Lion* on one narrow aspect of the Fairness Doctrine.

That Doctrine as applied in this case—a Doctrine with ambiguous and vague criteria and of uncertain applicability which abandons the "reasonable man" standard—cannot pass muster under the First and Fifth Amendments. It is inconsistent with the First Amendment's premise of robust, not "fair" or "balanced," debate and imposes an invalid "price" on the broadcaster's right to speak. This abridgment of First Amendment rights cannot be justified by any asserted unique status of the broadcast medium.

2. Nor can the ruling be supported as an ad hoc regulation of cigarette advertising. The FCC is not free simply to do what it thinks best when regulating broadcast advertising. At least absent some factor unique to broadcasting, and none is presented in this case, the FCC can

A. The Cigarette Labeling Act Itself Prohibits the FCC's Ruling

Congress's action was across-the-board. Section 2 of the Act states its purpose to be "to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health. . . ." This "comprehensive Federal program" represents a very careful balancing by Congress of two necessarily conflicting objectives.

One objective, according to Section 2(1), is that "the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes. . . ." Section 4 of the Act requires a warning—"Caution: Cigarette Smoking May Be Hazardous to Your Health"—to appear conspicuously on every cigarette package.

The second major objective is also spelled out in the Act. § 2(2). It is that

"commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy [of adequately informing the public by the warning on the package] and (B) not impeded *by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.*" (Emphasis added).

Section 5(a) of the Act bars any requirement that cigarette packages bear any warning statement other than that prescribed by Section 4, and Section 5(b) provides:

"No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."

It is clear that Congress intended these "preemption" provisions to apply to "all Federal, State, and local authorities. . . ." (Senate Report, 6; House Report, 5).

Section 5(c) of the Act affirms that, except for the preemption provided by Sections 5(a) and (b), the Act is not to be construed as affecting "the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes. . . ." The congressional Committee Reports, indeed, encouraged the FTC to prohibit the use of cigarette advertising that contains false health claims. (House Report, 5; see Senate Report, 6). And the FTC, when vacating the requirements of its Trade Regulation Rule because of the prohibition in Sections 5(a) and (b), stated that it would take action to prohibit any express or implied representation in such advertising that tended to undermine the package warning required by the Act. 30 Fed. Reg. 9484, 9485 (1965).

The provisions of the Act "which affect the regulation of advertising" are to terminate on July 1, 1969." § 10. Prior to this termination date, Congress is to receive periodic reports from HEW and from the FTC. HEW is to report concerning "current information on the health consequences of smoking"; the FTC is to report concerning "the effectiveness of cigarette labeling . . . [and] current practices and methods of cigarette advertising and promotion"; both are to make recommendations for legislation. § 5(d).

1. The Cigarette Labeling Act Preempts the Field

It is hornbook law that "Congress may, if it chooses, take unto itself all regulatory authority over" a particular area of Federal concern and that, when Congress has so occupied the field, there is no place for any supplementary, much less any conflicting, requirements. *E.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 236 (1947); *Campbell v. Hussey*, 368 U.S. 297, 300-01 (1961); *Southern Ry. v. Indiana*, 236 U.S. 439, 448 (1915). Here, Congress has done just that. It has made clear that "it intends no regulation except its own." *Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 236. This determination, binding

the states, *a fortiori* governs a Federal agency which is, after all, but a creature of Congress.

The Cigarette Labeling Act, on its face (§ 2), shows that Congress determined that the regulation of "cigarette labeling and advertising with respect to any relationship between smoking and health" called for the establishment of "a comprehensive Federal program." *Cf. Northern Natural Gas Co. v. Kansas*, 372 U.S. 84, 91 (1963) ("comprehensive scheme of federal regulation" preempts state action). This area required, so Congress concluded, a careful balancing by the Congress of conflicting objectives. *Cf. Hines v. Davidowitz*, 312 U.S. 52, 73-74 (1941). This, too, is spelled out on the face of the statute. Its background and legislative history confirm that a basic decision made by Congress was that it alone would determine where the balance was to be struck, that this area was too important and too delicate to be left to regulation by any administrative agency.

(i) *The health consequences of smoking*—The release in January 1964 of the Advisory Committee Report was a major factor leading to the Cigarette Labeling Act. That Report, however, did not silence or resolve the controversy as to the health consequences of cigarette smoking, and Congress did not so view the Report.

The Report made a number of detailed findings as to the relationship between cigarette smoking and overall mortality, as well as certain specific diseases, and stated that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." (Advisory Committee Report, 33).

Following its review of the medical evidence, the Senate Commerce Committee stated its conclusions as follows:

"While there remain a substantial number of individual physicians and scientists—the Commerce Committee received testimony from 39 of them—who do not believe that it has been demonstrated scientifically

that smoking causes lung cancer or other diseases, no prominent medical or scientific body undertaking a systematic review of the evidence has reached conclusions opposed to those of the Surgeon General's Advisory Committee. N.3.

"The Commerce Committee, therefore, concurs in the judgment that 'appropriate remedial action' is warranted." (Senate Report, 3).

The House Committee, however, as the FCC notes in its opinion, "was unwilling to conclude for or against the medical opinions embodied in the Advisory Committee's Report or the medical evidence elicited by its own hearings." (R. 827).

At the same time Congress recognized that research on the smoking and health question should continue and directed HEW to report periodically to the Congress, with legislative recommendations, concerning "current information on the health consequences of smoking." § 5(d)(1). Congress thus indicated its desire to be in a position to take into account any new information when it came to consider additional legislation by mid-1969.

(ii) *Economic implications of the matter*—In contrast to the controversy over the health consequences of smoking, there was no dispute in the congressional hearings as to the enormous economic implications of the problem that Congress undertook to resolve. The uncontested record showed, for example, that in 1963 approximately 70 million persons spent some \$8 billion on tobacco products (1964 House Hearings, 2, 170; 1965 House Hearings, 2, 34); of this amount some \$3.2 billion went to the Federal Government and state and local governments in taxes (1964 House Hearings, 2, 28, 139; Senate Hearings, 260; 1965 House Hearings, 2, 34); some 700,000 farm families produced tobacco with a cash value of some \$1.3 billion (1964 House Hearings, 139; Senate Hearings, 246, 941; 1965 House Hearings, 34, 283); the economies of the major tobacco growing

states were dependent on the tobacco industry (1964 House Hearings, 290, 310; Senate Hearings, 396, 406; 1965 House Hearings, 436); the distribution of tobacco products supported nearly 8 million persons (1964 House Hearings, 327); and the tobacco industry spent more than \$200 million on advertising. (Senate Hearings, 463; 1965 House Hearings, 39).

Section 2(2) of the Act (p. 26, *supra*) and the Senate and House Reports reflect Congress's determination not to cause avoidable economic injury. (See House Report, 3; Senate Report, 7).

(iii) *Conflict among the Federal agencies*—The need for Congress to balance all the interests involved was emphasized by the fact that the interested Federal departments and agencies could not reach agreement as to the measures to be adopted. See 111 Cong. Rec. 14413 (1965).

In June 1964 the Bureau of the Budget advised the House Interstate and Foreign Commerce Committee that it was unable to support the enactment at that time of any of the bills then pending. The reason given was the differing views of the various Federal agencies as to any new legislation. (1964 House Hearings, 13).

During the next session of Congress the conflict among executive agencies continued. The Department of Commerce, as it had the year before (1964 House Hearings, 19-20), saw no need for legislation. (Senate Report, 10-12; House Report, 13-16). The Department of Agriculture believed that further research was needed to determine whether legislation was necessary. (Senate Report, 8-9). The FCC, while it made no legislative recommendations, insisted that "the matter of cigarette advertising [should] be treated on an all-inclusive, across-the-board basis, rather than in a piecemeal fashion." (Senate Report, 13). The desirability of across-the-board treatment of cigarette advertising, as opposed to regulation of broadcast advertising

alone, had been urged previously by the FCC in letters to Senator Magnuson and Congressman Farbstien. (FCC 63-1033, Nov. 7, 1963; FCC 64-100, Feb. 5, 1964)

HEW, as it had the year before (1964 House Hearings, 18), recommended that it be granted the authority to regulate cigarette labeling. (Senate Report, 23; House Report, 10). The FTC felt that appropriate legislation would be desirable because legislation could take effect immediately, whereas the effectiveness of its Trade Regulation Rule would be delayed by litigation. (Senate Report, 15-16; 1965 House Hearings, 109). However, the FTC did not support HEW's legislative recommendations. (See Senate Report, 14-17).

(iv) *The role of Congress*—The judgment of Congress that only it, and not any subordinate agency, could strike an appropriate balance in the cigarette labeling and advertising area was clearly expressed. As stated by the House Interstate and Foreign Commerce Committee in its Report on the legislation (p. 3):

“The determination of appropriate remedial action in this area, as recommended by the Surgeon General's Advisory Committee, is a responsibility which should be exercised by the Congress after considering all facets of the problem. The problem has broad implications in the field of public health and health research, and involves potentially far-reaching consequences for a number of sectors of our economy. The entire tobacco raising and manufacturing industry, and the numerous businesses which market tobacco products, are involved. Some proposals have been made in this area which might lead to severe curtailing or the possible elimination of cigarette advertising. This could have a serious economic impact on the television, radio, and publishing industries in the United States.

“After giving consideration to various alternative approaches to the problem, the committee determined that congressional action should be taken in order to dispose of this problem promptly and effectively.”

House Committee Chairman Harris similarly explained Congress's preemptive approach:

"... I believe when you not only have the human body and human life involved but when you have our whole country tied up in a somewhat hard to unscramble situation where the authority runs from the Federal Government to the State government to the county government and sometimes to the city government, with our budgets and economy and our jobs, our employment, our welfare, and our health all combined, then I believe it is my job and your job to try to work this difficulty out as best we can. As for me, I think it is a job for the Congress to do and not an executive agency or a regulatory agency through its own action under a so-called rulemaking procedure whereby they announce what the results will be before they start the rulemaking. I say that because I think you will get better results throughout the Nation and you will get greater compliance and greater understanding with the legislative procedure which we are following. Therefore, this committee brings to you a very difficult problem but one which we have tried to meet forthrightly. We would ask your support on it." 111 Cong. Rec. 14410 (1965).

Congress's decision to take over resolution of the problem is further evidenced by the statutory requirement that HEW and the FTC submit periodic reports to the Congress. As stated in the Conference Report:

"It is the expectation of the conferees that before July 1, 1969, on the basis of all available information, including that contained in reports submitted, as required by this legislation, by the Secretary of Health, Education, and Welfare and the Federal Trade Commission, the Congress will reexamine the subject matter covered by this legislation." H.R. Rep. No. 586, 89th Cong., 1st Sess. 6 (1965).

Congress is thus to have a continuing role in determining whether the balance it struck in the Cigarette Labeling Act is an appropriate one or whether new information requires

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that the balance be shifted. The one thing Congress did not want was that an administrative agency act until Congress had an opportunity to take another look in light of further information that would be available by 1969.

Congress has thus asserted exclusive control over the regulation of cigarette labeling and advertising with respect to cigarette health warnings. It did so by enacting a "comprehensive Federal program," which allows for no FCC role in this area. The FCC cannot now, at least prior to 1969, fashion its own device to compel health hazard warnings in connection with cigarette advertising.

2. The FCC's Ruling Conflicts With the Cigarette Labeling Act

There is an additional reason why the FCC's ruling must be reversed: It is in flat conflict with the basic determinations made by Congress when it adopted the Cigarette Labeling Act and frustrates the purposes for which it was enacted. See *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *Farmers Union v. WDAY*, 360 U.S. 525, 535 (1959); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534 (1940); cf. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Erie R.R. v. New York*, 233 U.S. 671 (1914); *Northern Pac. Ry. v. Washington*, 222 U.S. 370 (1912).

Congress adopted the Act after it had given full consideration to the basis of the current FCC action, for the FTC had asserted to Congress that cigarette advertisements, notably television commercials, by portraying smoking as a pleasant activity, implicitly contained assurances that smoking was not hazardous and that this implicit message had to be counteracted by warnings as to the smoking hazard. The FCC now asserts this same FTC finding as the support for its ruling (p. 17, *supra*). But Congress decided that, whether or not this view of cigarette commercials is correct, it did not justify more than the remedial step taken in the Cigarette Labeling Act.

(i) *Adequacy of the regulatory measure adopted by Congress*—Section 2 of the Cigarette Labeling Act specifies that its purpose is to establish a program whereby “the public may be *adequately informed* that cigarette smoking may be hazardous to health *by inclusion of a warning to that effect on each package of cigarettes. . . .*” (Emphasis added). The Senate Report (p. 1) similarly characterizes the package warning as adequate:

“The purpose of this bill is to provide *adequate warning* to the public of the potential hazards of cigarette smoking *through cautionary labeling of cigarette packages.*” (Emphasis added).

As does the House Report (p. 1):

“The principal purpose of the bill is to provide *adequate warning* to the public of the potential hazards of cigarette smoking *by requiring the [cautionary] labeling of cigarette packages. . . .*” (Emphasis added).

That no additional coercive measures were warranted is emphasized in the second part of the Act’s statement of policy (§ 2(2)), which is that the economy should not be “impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.” Coercive, regulatory efforts are to be outlawed pending further consideration by Congress.

In determining to avoid any further regulation of cigarette advertising with respect to smoking and health, Congress—in addition to noting the prescribed package warning—pointed to the programs of HEW and of private agencies to disseminate information to the public and to the self-regulation of cigarette advertising by the tobacco and broadcasting industries as eliminating need for more drastic regulatory measures. (Senate Report, 5; House Report, 4-5). This decision was made after full consideration had been given by Congress to the extent, nature, and probable effect of these voluntary efforts.

These measures had led to sharply increased public discussion of smoking and health. As the Surgeon General noted at the 1965 congressional hearings, there had been "full coverage" by "newspapers, television, radio, and all means of communication" of newsworthy events, such as the release of the Advisory Committee Report, dealing with the asserted hazards of smoking. (Senate Hearings, 41).

In addition to this coverage, programs to educate and inform the public in the smoking and health area have been and continue to be pressed by public and private agencies. In June 1964 Congress was advised of HEW's plans

"to expand as rapidly as our resources will permit, a greatly intensified long-range program of public and professional information and education (including research and demonstrations related thereto) on the hazards of cigarette smoking and on methods to combat and control the smoking habit. As we envision it, the program, insofar as directed to the lay public, will utilize the various communication media and will be largely, though by no means exclusively, focused on youth, in cooperation with educational agencies and school systems (including use of school curriculums) and with State health agencies and the various voluntary organizations that will increasingly be engaged in educational activities of this nature. . . ." (1964 House Hearings, 15).

At the 1965 hearings the Surgeon General pointed to HEW's budget request for \$1.95 million to permit the Public Health Service "to step up its program in terms of the accumulating of scientific information and the dissemination of this information to the public, to the medical and health professions, as well as to improve the general overall administration of our information and education program." (Senate Hearings, 40). He was asked by Senator Magnuson, Chairman of the Senate Committee:

"... [R]adio and television stations have a certain amount of public service time. Do you utilize that at all or would you plan to?

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The Senate Report similarly commented on Governor Meyner's activities. (Senate Report, 5).

(ii) *Rejection of the Federal Trade Commission position*—Section 5 of the Federal Trade Commission Act directs the FTC to prevent, among other things, “unfair or deceptive acts or practices in commerce.” Under this statutory mandate the FTC has been active for many years with respect to cigarette labeling and advertising in light of the asserted health consequences of smoking.

In addition to instituting some 25 proceedings against individual cigarette manufacturers (see *Statement of Basis and Purpose of Trade Regulation Rule*, 29 Fed. Reg. 8325, 8374 (1964) (FTC Statement)), the FTC has also taken across-the-board action. In 1955 it promulgated Cigarette Advertising Guides which prohibited various representations as to the health consequences of smoking cigarettes in general or the advertised brand. The Guides allow “the use of any representation relating solely to taste, flavor, aroma, or enjoyment.” (FTC Statement, 29 Fed. Reg. at 8374).

A few days after the release of the Advisory Committee Report, the FTC instituted its Trade Regulation Rule proceeding by issuing a notice of rule-making in which it set forth its tentative views as to the statutory requirements governing cigarette advertising (including labeling) in light of the Advisory Committee's findings and proposed the adoption of a rule requiring a warning statement to be included in cigarette advertisements and on cigarette packages. 29 Fed. Reg. 530 (1964).

The proposal was the subject of written comments and of public hearings before the FTC during March 1964. Among other things, it was argued at the hearings that, because of the magnitude and public importance of the smoking and health question, it should be dealt with by Congress and not by any administrative agency. (See FTC Statement, 29 Fed. Reg. at 8363-64). Nonetheless the FTC

on June 22, 1964, adopted its Trade Regulation Rule requiring that each cigarette advertisement and package disclose that "cigarette smoking is dangerous to health and may cause death from cancer and other diseases." 29 Fed. Reg. 8325.

The basic FTC finding was that cigarette advertisements not containing the prescribed health warning would violate Section 5 of the Federal Trade Commission Act. The FTC concluded:

"The image of smoking projected in the typical cigarette advertisement is of a pleasant and happy activity. That image is inconsistent with and misrepresents the complete truth about smoking, which is that while it may afford pleasure, it is a habit difficult to break and extremely dangerous to life and health. To avoid giving a false impression that smoking, because it may be pleasant and satisfying, is therefore innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfactions of cigarette smoking in his advertising must also disclose the serious risks to life that smoking involves." (FTC Statement, 29 Fed. Reg. at 8356; Senate Hearings, 492).

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Congress, however, rejected this conclusion. The House Report on the Cigarette Labeling Act states (p. 4):

"The trade regulation rule adopted by the Federal Trade Commission would require, effective July 1, 1965, the inclusion of a warning in all advertising of cigarettes of potential hazards to health involved in smoking cigarettes. The reported bill would supersede the Commission's rule, because the committee feels that at the present time the necessity for, and the effectiveness of, this requirement has not been demonstrated."

The Committee then pointed to the change in cigarette advertising since the issuance of the Rule as a result of the Cigarette Advertising Code and to the informational and educational campaigns and concluded (p. 5):

"The foregoing, coupled with the compulsory warning on the package . . . leads the committee to conclude

that it is not necessary at this time to insert health warnings in cigarette advertising as proposed by the Federal Trade Commission."

The Senate Committee was in accord (p. 5):

"Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package which will be required under the provisions of this bill, it was the committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking."

In short, Congress determined that the only warning required was the prescribed warning on cigarette packages. It did so despite the claim, vigorously pressed by the FTC, that the package warning was not sufficient because of the alleged misleading nature of cigarette advertising. The FCC now urges this same view of cigarette advertising as the basis for its action, relying on the FTC's 1967 Report to Congress (*supra*, p. 17) which simply reiterates the position taken by that agency when it issued its Trade Regulation Rule. (R. 838). That position was rejected by Congress. In view of the extensive economic interests involved and the state of medical knowledge, Congress decided that the package warning was sufficient, at least until July 1969. The FCC's ruling is in direct conflict with this determination.

B. Especially in Light of the Cigarette Labeling Act, the FCC's Ruling Is Invalid Because Contrary to the "Public Interest"

The only possible basis for the FCC's action is the "public interest" standard of the Communications Act. This standard must be read in light of the purpose manifested in the Cigarette Labeling Act. Since the FCC's ruling is

inconsistent with that purpose, it cannot be said to be in the "public interest."

In paragraph 64 of its opinion (R. 855) the FCC states, "Ordinarily the question presented would be how the carriage of such [cigarette] commercials is consistent with the obligation to operate in the public interest." But, the FCC goes on, "In view of the Legislative history of the Cigarette Labeling Act, that question is one reserved for judgment of the Congress. . . ." The FCC thus acknowledges that, in light of the Cigarette Labeling Act, the "public interest" standard of the Communications Act would not permit the barring of all cigarette advertising. This is so even though the Cigarette Labeling Act does not expressly deny the FCC this power. Similarly, although the Cigarette Labeling Act does not expressly deny the FCC the power to require a health warning "adjacent to" cigarette commercials or to require that the same amount of time be given to health hazard warnings as is devoted to cigarette commercials, the FCC acknowledges that it could not do so because "this would be inconsistent with the Congressional direction in this field provided in the Labeling Act." (R. 830). In other words, the "public interest" requirement of the Communications Act is to be read in light of the congressional purpose expressed in the Cigarette Labeling Act.

That purpose, as has been shown, was to strike a balance among the various competing interests and to avoid anyone's tinkering with that balance in this delicate area at least until Congress had an opportunity to consider the matter again. Congress was convinced that it—and not any administrative agency—should deal with the problem because of the vital interests affected. Congress also determined that at least until July 1969 the package warning prescribed by the Cigarette Labeling Act was a completely adequate regulatory method of informing the public of the possible smoking hazard.

The FCC must respect these congressional determinations. First, the FCC's ruling does not rest on any specific grant of authority but merely on the FCC's general mandate to consider the "public interest" in granting and renewing broadcast licenses. This generality should not be read as though it were an isolated expression impervious to evolving congressional policies. As the FCC stated in its opinion (R. 833), quoting from *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942):

"... this Commission, like other administrative agencies, was 'not commissioned to effectuate the policies' of the Communications Act 'so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.' ..."

See also *California v. FPC*, 369 U.S. 482, 484-85 (1962). Moreover, in this instance, the "public interest" questions presented involve no FCC expertise, and, in fact, Congress gave far more intensive consideration to these questions than did the FCC.

Second, during its consideration in 1964 and 1965 of the bills that led to the Cigarette Labeling Act, Congress solicited the views of all Federal agencies that might conceivably have anything to say about the cigarette health controversy. Even the District of Columbia Board of Commissioners was asked for its views. (Senate Report, 9-10). Congress obviously wanted to be certain that it knew what its agencies considered as their roles in this area. What was the FCC's response? The FCC expressly and repeatedly advised Congress that it felt that cigarette advertising on radio and television should not be handled on a special basis but only as a part of an across-the-board treatment of cigarette advertising in all media and that it

was proposing no special action on its own. In formal comments to the Senate Commerce Committee in February 1965 on two pending bills, the FCC stated:

"The Federal Communications Commission's interest in this matter is necessarily limited to the use of broadcast media for cigarette advertising. It seems clearly appropriate, however, that the matter of cigarette advertising be treated on an all-inclusive, across-the-board basis, rather than in a piecemeal fashion. Since the Federal Trade Commission has undertaken to deal comprehensively with the remedial action needed to protect the public in the light of the report on smoking and health, issued January 11, 1964, by the Advisory Committee to the Surgeon General, the Federal Communications Commission has not held proceedings, or undertaken studies, to evaluate the various factors and considerations in this area. While we believe that some action on an overall basis is appropriate, we are thus not in a position to make recommendations to the Congress in this field, and specifically, as to whether S. 547 or S. 559 should be enacted. ✓

"The Commission recognizes the importance of this matter. In exercising its public interest responsibilities in connection with broadcast licensees, *it will, of course, cooperate in the application of whatever Federal law, policy, or regulations are adopted in this area.*" (Senate Report, 13-14). (Emphasis added).

This language was the same as that used by the FCC in July 1964 when commenting on another Senate bill (FCC 64-730), and these same views had also been expressed in formal, "by direction of the Commission," letters to Senator Magnuson (FCC 63-1033), Congressman Farbstein (FCC 64-100), a constituent of Congressman Farbstein (FCC 64-99), and Chairman Dixon of the Federal Trade Commission (FCC 64-29).

The FCC could hardly have told Congress more clearly that it was contemplating no independent action but stood ready to accept the resolution of the problem arrived at by Congress. As the FCC knew full well, Congress was

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deeply concerned with the problem of cigarette advertising. Moreover, Congress was informed that by far the major part of cigarette advertising was on radio and television—about three quarters of the total measured by advertising expenditure.¹⁵ When Congress determined, as it did, that the health warning on cigarette packages was the means for “adequate warning to the public” (*supra*, p. 34), this meant that it was determining, primarily, that that warning was adequate for the radio and television listeners. Believing as a result of the FCC response that the only threatened administrative agency action with respect to cigarette advertising was that proposed by the FTC, Congress thought that it was providing for a “comprehensive program” to effect a balance of the several pertinent interests that would prevail undisturbed until it could review the problem anew in 1969. It is not a tolerable exercise of its “public interest” power for the FCC now to shift its position and to prescribe a further cigarette health warning beyond that found adequate by Congress, and to do so in the case of the very advertising medium with which Congress had been principally concerned.

C. The Commission Erred in Its Efforts To Avoid the Impact of the Cigarette Labeling Act

The FCC, recognizing the important bearing of the Cigarette Labeling Act on the legality of its action, devotes a good deal of space to an attempt to rid itself of this embarrassment. (R. 824-37, 857-60). It relies mainly on the wording of Section 5(b) of the Cigarette Labeling Act, on Congress's recognition of the important role to be played by smoking education campaigns, and on the reports recently submitted to Congress by HEW and the FTC pursuant to Section 5(d) of the Act.

¹⁵ Of approximately \$200 million spent by the tobacco industry on advertising in 1968 (see p. 30, *supra*), more than \$125 million was devoted to television advertising (1965 House Hearings, 39), and more than \$20 million was for radio advertising. (Senate Hearings, 960).

In light of what has already been said, these points can be dealt with in short order.

1. The FCC relies on the fact that Section 5(b) of the statute precludes a requirement of health warning statements "in the advertising" of cigarettes—and not "because of the advertising" of cigarettes—and argues that its ruling is not, therefore, inconsistent with the statute. (R. 825, 829-30). ✓

The wording of Section 5(b) does not, however, reflect any narrow congressional purpose and is explained by the nature of the only regulation then facing cigarette advertising—the FTC's Rule requiring that all cigarette advertisements contain health warnings. Congress's assumption that it need concern itself specifically only with the FTC is evident from Section 5(c) of the Act where only the authority of the FTC is mentioned (see p. 27, *supra*). Congress could hardly have been expected to have directed itself in terms to the FCC's current action in light of the FCC's failure even to hint to Congress, when the FCC's views were requested, that it had any intention of becoming an independent factor in the cigarette advertising controversy. *admittedly this is reasonable*

Section 5(b) must be construed broadly, in accord with the stated congressional purpose and the legislative history, and the word "in" may not be read so grudgingly as to allow the intent of Congress to be circumvented.¹⁶ Were the FTC to undertake to prohibit newspapers (or broadcasters) from carrying cigarette advertisements unless those media also carried prominently placed health warnings, there is no doubt that the Cigarette Labeling Act would prevent such action even though the prescribed warnings were not required to be "in" the advertisement.

¹⁶ See, e.g., *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 321 (1965) (literal wording of statutory provision not controlling where it defeats congressional purpose); *United States v. American Trucking Ass'n, Inc.*, 310 U.S. 534, 543 (1940) (court will follow purpose of statute rather than its literal words where "plain meaning" of statutory provision is at variance with policy of legislation).

There also can be no doubt that a state would similarly be prohibited from requiring local advertising media that carry cigarette advertisements to carry health warnings, whether or not required literally to be "in" the advertisement. That the possibility of FCC action was not specifically dealt with by Congress—because led by the FCC to believe that it need not concern itself with possible FCC action—is no reason to permit the FCC to do what the FTC and the states could not do. Section 5(b) is not limited to the FTC and the states but applies to the FCC as well.

Moreover, the FCC has recognized that the literal interpretation of Section 5(b) does not mark the outer limit of the effect of the statute. As has been shown (p. 41, *supra*), the FCC acknowledges that it is barred from imposing requirements not expressly covered by the prohibition in Section 5(b). This conclusion can only reflect the judgment that Section 2 of the statute and its legislative history, as well as Section 5(b), must be considered in determining the reach of the statute.

2. The FCC argues that its action is in accord with the Cigarette Labeling Act, claiming that its ruling "implements" the smoking education campaigns which Congress relied on in enacting the statute. (R. 830). This argument is disingenuous.

It has been shown (pp. 39-40, *supra*) that Congress referred to the voluntary smoking education campaigns as a basis for *not* imposing regulatory requirements with respect to advertising. For the FCC to argue that this reference justifies its *regulatory* action is directly contrary to Congress's purpose. Moreover, the argument overlooks a basic distinction between voluntary, noncoercive education campaigns and coercive regulatory requirements, a distinction sharply drawn by HEW. (1964 House Hearings, 15-16). As already discussed, Congress wanted to encourage the former efforts and preclude the latter, at least until it

but coercive
of warning

was seen, by Congress, whether noncoercive measures were adequate.

The educational efforts of which Congress was aware when it enacted the statute and to which it referred were voluntary and noncoercive. There was no suggestion that broadcasters would be compelled to educate the public as to the asserted health hazards of smoking; as shown above (pp. 35-36, *supra*), in at least one instance it was recognized that the various advertising and communications media would be free, as they saw fit, to use or not to use the material made available by those interested in asserting the health consequences of smoking.

3. In an attempt to explain away its failure to honor the representations it made to Congress, the FCC relies on the 1967 HEW and FTC reports as establishing, beyond doubt, the health hazards of smoking and the effects of advertising in encouraging smoking. (R. 835-37). However, the relevance of these reports to the question of whether the FCC's action is or is not precluded by reason of the Cigarette Labeling Act is never made clear.

Obviously, these reports can have no bearing, one way or the other, on the preclusive effect of the 1965 statute. The FCC action, having been barred by reason of the Cigarette Labeling Act, cannot be made lawful by the views of other agencies as to the need for new legislation. Nor can the reports serve as any reliable indication of what Congress is likely to do in the future. Congress has been known not to accommodate itself to the views of Federal agencies. In 1965 Congress rejected the position of both HEW and FTC as to the measures to be taken with respect to cigarette labeling and advertising.

Finally, the very fact that Congress has required reports demonstrates that it is to be Congress, and Congress alone, that is to determine policy in this area. Congress may accept the conclusions of these agencies—or may reject or modify them. But until July 1, 1969, these reports can-

not support any regulatory action not provided for in the current "comprehensive program" enacted in the Cigarette Labeling Act.

**II. WITHOUT REGARD TO THE CIGARETTE LABELING ACT,
THE RULING IS IN EXCESS OF THE FCC'S STATUTORY
AND CONSTITUTIONAL AUTHORITY**

"[T]he Commission," says Commissioner Loevinger in his concurring opinion, "has not been given a roving mandate by Congress to do whatever it may regard as socially desirable (i.e., 'in the public interest')." (R. 862). The other Commissioners apparently cannot decide whether or not they agree with Commissioner Loevinger. On the one hand, the opinion appears to acknowledge some limitation on the FCC's authority, for it seeks to support the ruling on the basis of the Fairness Doctrine, a preexisting FCC policy that it feels received statutory recognition in the 1959 amendment to Section 315. But the FCC is concerned that the ruling does not fit this Doctrine. Hence, on the other hand, the opinion "extends" (R. 822) the Fairness Doctrine so that the ruling becomes an *ad hoc* regulation of cigarette advertising, not embraced by "the specifics" of that Doctrine or the requirements of "a particular doctrine," but based only on the "simple fact" that it is "in the public interest." (R. 855-56, pp. 17-18, *supra*).

**A. The FCC's Ruling Cannot Be Upheld on the Basis
of the Fairness Doctrine**

As allegedly codified in the 1959 amendment to Section 315, the Fairness Doctrine requires that a broadcaster

"afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

1. The Ruling Is Inconsistent With the Fairness Doctrine

(i) *The erroneous standard applied by the FCC*—Before the 1959 amendment was adopted, during its consideration by Congress, and since its enactment, the FCC earnestly

repeated, time and time again, that the requirements of the Fairness Doctrine are satisfied by broadcasters' honest, good faith, reasonable judgments and that the FCC will not substitute its judgment for that of the broadcaster on *any* decision under that Doctrine.

We have already seen the FCC's profession of this standard of "reasonableness" in its seminal *Report on Editorializing* (p. 10, *supra*). Congress was informed in 1959, when amending Section 315, of the discretion that the Fairness Doctrine, as opposed to the "equal time" requirement of that section, reposed in broadcasters. See, *e.g.*, *Hearings on S. 1585, S. 1604, S. 1858 and S. 1929 Before the Communications Subcommittee of the Senate Commerce Committee*, 86th Cong., 1st Sess. 68 (1959). The FCC went out of its way again, when issuing its *Fairness Primer* in 1964, to state that this broadcaster discretion applied to "all the . . . facets" of the Fairness Doctrine, not only as to the details of the format and spokesmen to be used by the broadcaster to present the differing viewpoints, but also "as to whether a controversial issue of public importance is involved, [and] as to what viewpoints have been or should be presented. . . ." 29 Fed. Reg. 10415, 10416. (Emphasis added). The FCC stated explicitly:

"In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably." *Ibid.* See also FCC Letter to Chairman Oren Harris, 3 P & F Radio Reg.2d 163, 167-68 (1963); *Red Lion Broadcasting Co. v. FCC*, — U.S. App. D.C. at —, 381 F.2d at 923-24.

The FCC's opinion in this case, however, reflects a completely different approach. As stated by the FCC, it has concluded that

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The FCC's opinion in this case, however, reflects a completely different approach. As stated by the FCC, it has concluded that

" . . . it is not an abuse of discretion for the Commission to decide now that a licensee [broadcasting

cigarette commercials must broadcast cigarette health warnings]” (R. 823).

Suddenly the issue is not—despite the FCC’s repeated assurances—the reasonableness of the broadcasters’ judgment but, instead, the reasonableness of the FCC’s judgment. The FCC is doing in this case precisely what it repeatedly said it would not do¹⁷—it is invading the zone of reasonableness and substituting its judgment for that of broadcasters.¹⁸

(ii) *The impact of the erroneous standard*—This reversal by the FCC of the “reasonableness” standard under the Fairness Doctrine could have near revolutionary impact on broadcasters’ programming freedom.

If the ruling is to stand as a Fairness Doctrine ruling, then it can be rationalized only in these terms: *Any* cigarette commercial is such a “discussion” of “views” on an issue “of public importance” as to obligate the broadcaster to program discussion of conflicting views for a related significant time. It is perfectly apparent that a reasonable man could regard *some* cigarette commercials as not involving such a “discussion.” Some, indeed, are almost completely whimsical—e.g., the silhouettes on a teeter totter, with a cigarette pack finding, apparently, “balance” at the fulcrum. But it may be that another reasonable man could regard even such matter as, in some

¹⁷ The “reasonable man” has receded from view in another recent Fairness Doctrine ruling. In *King Broadcasting Co.*, 11 P & F Radio Reg.2d 628 (1967), a licensee had endorsed certain candidates for the Seattle, Washington, city council. It offered broadcast time to the supporters of the non-endorsed candidates. On the complaint of one of these candidates, the FCC concerned itself with the *precise number of exposures and seconds per exposure* to be given to supporters of the non-endorsed candidates, reversing the broadcaster’s judgment on the former question. Thus was there censorship in Washington, D.C., under the Fairness Doctrine of the minute details of electioneering for a local city council election some 3,000 miles away.

¹⁸ Cf. *Cincinnati, N.O. & T.P. Ry. v. ICC*, 162 U.S. 184 (1896); *ICC v. Cincinnati, N.O. & T.P. Ry.*, 167 U.S. 479 (1897) (ICC jurisdiction to enforce statutory requirement—as it existed prior to the Hepburn Act of 1906, 34 Stat. 584, 49 U.S.C. § 15—that carriers set reasonable rates authorizes ICC only to strike down rates beyond the zone of reasonableness, not to set rates within that zone).

faint measure, a "discussion" of the "desirability" of cigarette smoking. Hence "it is not an abuse of discretion," says the FCC, for it to treat all such commercials as such a "discussion." (R. 823).

This rationale places within the FCC's unfettered power the imposition of the strictures of the Fairness Doctrine on any portrayal of the "desirability" of anything about which there is an issue of public importance. And the scene of our quite open society is literally permeated with things as to the "desirability" of which there is significant public controversy.

We may start with cigarettes. Do commercials portray the "desirability" of smoking more eloquently than Jackie Gleason's chain puffing at the opening of his family hour every Saturday evening, or Arnie Palmer's smoking as he leads his army to the attack on the critical last four holes?

But cigarettes are lost in the maze of controversial things. Horse racing is exposed on TV in a most favorable light, with the flashing odds plainly to be seen. Wrestling "matches"—to say nothing of prize fighting—have enthralled millions of broadcast listeners and viewers. Though football exacts its yearly toll of death and serious injury among youngsters, it is extensively and favorably broadcast. Broadcast movies or TV or radio drama suggest the "desirability" of any number of courses of action, ideas, outlooks, etc., many of which are highly controversial.

Or take commercials. Products or services about which there is important controversy, very often the subject of Government concern, are plentiful. Commercials often portray their "desirability" and with much less restraint than is true of cigarette commercials. Tonics and pills for tiredness, for sleeplessness, for colds, for headaches, for arthritis, almost for what-have-you are prominently programmed; but Government has variously reported on many of them. Automobiles are extolled, with never a

word about any lethal defects or their contribution to the poison of smog. Beer and wine, highly controversial in both "dry" and "wet" areas, are plugged enthusiastically. The listing could be extended at great length.

To allow the Fairness Doctrine to be applied, at the FCC's discretion, to any and all such situations would give it an intolerable control. Programming could become so cluttered and unwieldy, and there could be such drains on the broadcaster's revenues, that broadcasting would be seriously damaged.

(iii) *The FCC's failure to narrow its ruling in tenable terms*—The FCC recognized that to justify its ruling by the Fairness Doctrine required a most embracing rationale, and was troubled. So it suggested, quite ambiguously, that it might never be applied to any commercials except for cigarettes. (R. 847).

The opinion resorted to rhetoric—branding the other situations to which its rationale would apply as a "parade of 'horrible' extensions." (R. 855). (Commissioner Johnson added the rhetorical "slippery slope." (R. 869)). But rhetoric cannot suffice—for rules of law have to be tested by their application to related situations.

Apart from rhetoric the opinion relies on but one basis for distinguishing cigarettes. Cigarettes, it says, raise an issue of health. Their "normal use," according to Government reports, may be a health hazard. (R. 846).

The strain on reason caused by this distinction is brought out in a one sentence footnote of critical importance at the end of paragraph 37 of the opinion. (See R. 838-41). In that paragraph the FCC recites the FTC's conclusion (and supporting "documentation") in its 1967 Report to Congress, its first pursuant to the Cigarette Labeling Act, that in cigarette advertising "the impression is conveyed that smoking carries relatively little risk" because it associates smoking "with attractive people and enjoyable events and

experiences." (R. 838). This is the key point in the FCC's treatment of the problem: *implicitly* promotional advertising represents to the audience that use of the promoted product involves "little risk." The footnote (R. 841, n. 21) is this:

"While we have, as petitioners point out, distinguished between *explicit* and *implicit* raising of controversial issues in broadcast material *where health was not involved* (e.g., atheists and agnostics versus the broadcast of religious services), we do not regard those cases as pertinent here in view of the nature of the controversial issue." (Emphasis added).

What the footnote refers to is the FCC's decision that the broadcast of church services does not trigger the Fairness Doctrine so as to call for provision of time to air the views of atheists or agnostics. *Mrs. Madalyn Murray*, 5 P & F Radio Reg. 2d 263 (1965). See also *Robert H. Scott*, 25 P & F Radio Reg. 349 (1963); *Edward J. Heffron*, 3 P & F Radio Reg. 264a (1948); *Robert Harold Scott*, 3 P & F Radio Reg. 259 (1946). Needless to say, cigarette commercials are no more "explicit" on any controversial issue than are church services; the latter, indeed, are quite explicit, and typically include "discussion" in the most literal sense. But with very good sense the FCC says that the broadcast of church services only "implicitly" takes sides on a controversial issue and the Fairness Doctrine is not triggered.

The same could be said of the many other things to which the FCC's rationale in the present case would apply that we referred to *supra*, pp. 51-52. The broadcasting of horse racing, of a drama, of a beer or wine commercial only "implicitly" takes sides.

And so, exactly, of cigarette commercials.

But, says the FCC, cigarettes concern a health issue. Therefore, their "implicit" raising of the issue will trigger the Fairness Doctrine.

public interest

The question at once may be asked where the FCC obtained the authority to become the arbiter of the relative importance of physical health, on the one hand, and, on the other, of the spiritual well-being involved in church services, a question that has been disturbing philosophers for centuries and that one would think outside the sphere of administrative agency competence. However that question may be answered, there is not the remotest suggestion in the language of Section 315 or in any previous exposition of the Fairness Doctrine that would make of health issues a special category. On the contrary, precedent treats programming of controversial health issues, for purposes of the Fairness Doctrine, exactly like the programming of other issues. See *Broadcast of "Living Should Be Fun,"* 33 F.C.C. 101 (1962).

Nor is there to be found either in the language of Section 315 or in any previous exposition of the Fairness Doctrine any support for a distinction between a health issue respecting which Government reports disclose hazard in normal use and other kinds of health issues.

That Government has spoken should be of no moment. The FCC has held, in a Fairness Doctrine case involving a civil rights controversy, that it is irrelevant "that the proponents of one particular position on such an issue are elected officials." *Lamar Life Insurance Co.*, 18 P & F Radio Reg. 683, 684 (1959). The *Report on Editorializing* itself stressed that the Fairness Doctrine should be administered without regard to the "possible unpopularity of the views to be expressed." 13 F.C.C. 1246, 1250. See also *Robert Harold Scott*, 3 P & F Radio Reg. 259 (1946). If Government is to weight the scales in deciding Fairness Doctrine cases, surely the door has been opened to Big Brother and the First Amendment must slam it shut. The Fairness Doctrine that was allegedly ratified by Congress in Section 315 gives no power to Government to have the

public propagandized. See *Report on Editorializing*, 13 F.C.C. 1246, 1250.¹⁹

In any case Government has spoken on a variety of situations in the health area: examples are automobiles, foods and drugs, insecticides, other hazardous substances, as well as air and water pollution.²⁰ Nor, of course, does Government limit itself to health issues.

Nor is the case of cigarettes distinguishable from others on the ground that the controversial issue is involved in cigarettes' normal use. Thus in the case of automobiles, Mr. Nader is concerned with the defects in normal use (not just in the use by the drunken speeder), and Commissioner Loevinger with their contribution to smog in normal use. (R. 863). So the controversy over cholesterol in dairy products has to do with normal use, as did Rachel Carson's concern with the use of pesticides. Indeed, in the case of the airlines it is their normal use of the airspace near airports that sparks so much grave controversy on issues of safety and noise, directly sharpened by the vigorous promotion of the growth of air traffic in broadcast commercials.

If broadcasters could be assured that the extension of the Fairness Doctrine regulation to cigarette advertising would go no further, and that in all other cases they would be free to apply the implicit-explicit distinction and to be sustained whenever their judgment is honestly exercised

¹⁹ A number of years ago the Department of Agriculture urged broadcasters to disseminate the Government's position on a wheat referendum then pending before farmers. This effort by the Department of Agriculture, when it came to light, was severely criticized as an unconscionable attempt to impose the Government's will on broadcasters. *Hearings on Broadcast Editorializing Practices Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 88th Cong., 1st Sess. 145-47, 149 (1963).

²⁰ See National Traffic and Motor Vehicle Safety Act, 80 Stat. 718 (1966), 15 U.S.C. §§ 1381 *et seq.*; Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301 *et seq.*; Federal Insecticide, Fungicide and Rodenticide Act, 61 Stat. 163 (1947), as amended, 7 U.S.C. § 135; Federal Hazardous Substances Labeling Act, 74 Stat. 372 (1960), as amended, 15 U.S.C. §§ 1261 *et seq.*; Clean Air Act, 69 Stat. 322 (1955), as amended, 42 U.S.C. § 1857; Federal Water Pollution Control Act, 68 Stat. 1155 (1948), as amended, 33 U.S.C. § 466.

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on an overall basis as to "all the . . . facets" of the Fairness Doctrine, as the *Report on Editorializing* and the *Fairness Primer* assured them they would be (*supra*, pp. 10, 12-13), their concern about the potential impact of this case would be greatly lessened although serious questions of law and principle would remain.

The nature of the assurance in the FCC's opinion, however, is too weak to be credited: ". . . we can only state that we do not now know of" other cases. (R. 847).

Thus this same Commission, or a later,²¹ can find with equal ease that any number of types of commercials or other programming *implicitly* take a stand on some controversial issues. As long as reasonable men may differ on the question, the FCC's resolution will not be an abuse of discretion; the broadcaster's own judgment, however honest, is beside the point.

(iv) *The FCC's failure to abide by previous Fairness Doctrine rulings*—Nor is it to be overlooked that the FCC was so carried away in this case as to fashion requirements never before suggested. "Each week," and apparently with some regularity within "each week," it seems that every broadcaster of cigarette commercials must program cigarette health hazard warnings (p. 3, *supra*). This leaves but limited play for the broadcaster's judgment. Moreover, this opinion appears to say, for the first time, that the broadcaster's obligation is not confined to making reasonable efforts to secure spokesmen for various viewpoints but that, if he fails to find them, he himself must take to the air (p. 3, *supra*). This is quite contrary to what the FCC always has said of the Fairness Doctrine. *Report on Editorializing*, 13 F.C.C. 1246, 1250-51 (1949); *Evening*

²¹ The opinion earlier had made a wholly unsuccessful effort to imply that its precedents indicated application of the Fairness Doctrine to product advertising (R. 820-22), but then had concluded that "In any event" the Doctrine would be extended "to cigarette advertising at this time" (R. 823), with a footnote stating that "It has long been recognized, of course," that the Commission can always change its view of the requisites of the public interest. (R. 823, n. 8).

Newspaper Ass'n (WWJ), 6 P & F Radio Reg. 283 (1950); *Broadcast of "Living Should Be Fun,"* 33 F.C.C. 101, 107 (1962). And the thing that the broadcaster must do is very specifically defined: by others or by himself he must warn of the asserted cigarette hazard.

Finally, so fully preoccupied is the FCC with dictating that cigarette advertising is to be counterbalanced by health warnings that in "clarifying" its opinion it retreated even from the semblance of Fairness. It does not even purport to apply an obligation to "afford reasonable opportunity for the discussion of conflicting views" The cigarette commercials have to be silent on the health issue (pp. 36-38, *supra*). But if such commercials are broadcast, only the health hazard warnings are required to be heard in addition; no opportunity is required for those who believe that the hazard has not been proved, or that it has been exaggerated, or that its danger is balanced by the tremendous human interests involved in the tobacco country, or anything else. The Fairness Doctrine, as heretofore applied, calls for a reasonable opportunity to discuss "all" responsible viewpoints. *E.g., Report on Editorializing*, 13 F.C.C. 1246, 1250 (1949).

But in this case just one side is to be heard, the side of certain Government agencies and their adherents. This gross one-sidedness relieves the broadcaster of a very serious potential burden involved in the application of the Fairness Doctrine. But it makes a mockery of the FCC's claim that its ruling is supported by the Fairness Doctrine.

(v) *Inapplicability of the Fairness Doctrine to ordinary commercial advertising*—In all the annals of the FCC, before this case, there was but one instance, and that by dictum, of a case where it was even suggested that ordinary commercial product advertising might entitle others to be heard. The others in that case offered to pay for their time. The case, decided long ago, was *Sam Morris*, 11 F.C.C. 197 (1946), where alcoholic beverages were adver-

tised by radio in a territory a considerable fraction of which was "dry" and where it was thought that the viewpoint of temperance groups ought also to be broadcast. The dictum was an aberration. By 1956 it was held that such advertising is a matter purely of licensee discretion. *WPTF Radio Co.*, 12 P & F Radio Reg. 609, 660 (1956).²² And, despite the highly controversial nature of alcoholic beverages, when the Fairness Doctrine was adopted, after two years of consideration by the FCC, *Sam Morris* was not mentioned and it was not suggested that such advertising triggers the Doctrine.

Indeed, the *Report on Editorializing* did not even hint that any mere commercial advertising possibly could trigger the Doctrine. When the FCC explained the Doctrine to Congress at the time of the 1959 amendment to Section 315, no such suggestion was made. Again, in 1964, when the FCC issued its *Fairness Primer*, not one of the 28 interpretive rulings there digested dealt with commercial advertising, nor did the *Primer* otherwise indicate the applicability of the Fairness Doctrine to such advertising.

Nor is the language of Section 315 apt to an application to ordinary advertising. To speak of the usual advertising patter (or pretty pictures) as a "discussion" of "views on issues of public importance" warps words—especially when those words are read against the exposition of the Doctrine in the *Report on Editorializing*. That Report was concerned with the informing of listeners on differing views on public issues. It is absurd to say that a quick shot of a pretty girl drawing on a cigarette informs the public of a view on a controversial issue. Nor if her expression betrays satisfaction is there any informing of the

²² That case involved the applications of two radio station licensees for the same vacant television assignment. The FCC undertook detailed comparison of the two radio stations' programming. But a claim of preference by one applicant on the basis that the other's radio station carried beer and wine advertisements was rejected by the FCC on the ground that "we believe that this is a matter which is peculiarly within the realm of licensee responsibility." 12 P & F Radio Reg. at 660. See also *Delsea Broadcasters (WDVL)*, 16 P & F Radio Reg. 86, 100e (1958) (palm reading).

public. It happens to be one of the few uncontroversial facts of life that smoking a cigarette provides certain satisfaction. Except for the whimsey—of which there is a good deal—that is about all that cigarette commercials portray.

There is abundant good reason for excluding ordinary product advertising from the scope of the Fairness Doctrine, quite in addition to the words of Section 315 and the sense of the FCC's previous expositions. For it was decided in the critical days of the 1920's and early 1930's that radio should depend upon revenues from the sale of advertising. The Radio Act of 1927 was pointedly but unsuccessfully attacked on the Senate floor for its failure to grant the Commission the authority to regulate advertising. 68 Cong. Rec. 4109, 4112 (1927). In 1932 the Senate raised the issue for what essentially was the last time when it asked the Radio Commission for its views as to the need for new legislation governing radio advertising. S. Res. No. 129, 72d Cong., 1st Sess. (1932), 75 Cong. Rec. 1412-13 (1932). The Commission responded that, while additional authority to regulate the quantity of broadcast advertising might be feasible, "the quality of advertising might and probably would be difficult of adequate regulation." S. Doc. No. 137, 72d Cong., 1st Sess. 33 (1932). The Commission went on to say: "The American system of broadcasting is predicated upon the use of radio facilities as a medium for local and national advertising. Upon this use depends the quantity and quality of commercial and sustaining programs." *Id.* at 36. Congress was persuaded by the Commission's views, for, when it passed the Communications Act of 1934, it did not disturb the regulatory scheme of the Radio Act of 1927 respecting advertising. As the Supreme Court has observed: "... the [Communications] Act does not essay to regulate the business of the licensee." FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

The amazing development of our broadcasting, far exceeding that of any other nation, has been based on the decision of Congress not to impose any unique restraints on the general run of broadcast advertising (i.e., restraints not applicable to other advertising media).²³ To exist, (broadcasters are compelled to find advertising, with enough revenue, to sustain a very large and constantly growing expense as the quality of programming, particularly on TV, improves. To fertilize what once was suggested to be a wasteland requires advertisers' revenues. In the advertising area, the broadcasters' choice is restrained, and properly, by their own codes, by the general limitations on all media imposed by certain Government regulation of advertising, and by any statutes specially applicable to broadcasting. (See n. 23, *supra*). To restrain choice further is not lightly to be undertaken.

The restraint that would be involved in applying to ordinary advertising that does not discuss controversial issues the requirements of the Fairness Doctrine would be very considerable. For those requirements, as we have seen, involve loss of salable time and can considerably complicate programming, and are becoming increasingly meticulous, with growing resort to the letter ruling ukase.

✓ The good sense of the matter, then, is to treat the words of Section 315 to mean what they say, to confine the Fairness Doctrine to genuine discussion of views on public issues, and, however "controversial" one or another product may be, not to apply that Doctrine so that its requirements are triggered by ordinary advertising patter or picturing.

²³ In those instances where Congress intended special regulation of the content of broadcast advertising, Congress has provided for it in specific terms. See, e.g., 18 U.S.C. §§ 1304 (broadcasting lottery information or advertisements), 1343 (fraud by wire, radio or television).

2. The Fairness Doctrine Is an Unconstitutional Abridgment of First and Fifth Amendment Rights

Assuming that the Communications Act can be said to contemplate the application of the Fairness Doctrine in this case, serious First and Fifth Amendments issues are presented.

On the First Amendment issue the much mooted point of the extent of that amendment's protection of commercial advertising as such²⁴ becomes quite irrelevant. For cigarette commercials are held to trigger the Fairness Doctrine because, according to the FCC, they express a view on a public issue. Hence, by hypothesis, they are just like advocacy of an end to the Vietnam War, or of the Administration's tax increase proposal—and entitled to the same degree of constitutional protection.

(i) *Applicability of First Amendment to broadcasting*—There can be no dispute that communication by means of radio and television enjoys the protection of the First Amendment. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587, 589 (1954) (concurring opinion); *Estes v. Texas*, 381 U.S. 532, 585, 589-90, 604, 615 (1965) (concurring and dissenting opinions).²⁵

(ii) *Departure from the basic scheme of First Amendment protection*—The Fairness Doctrine's emphasis on "fair" debate on each station is inconsistent with the First Amendment premise that everyone with something to say is to be permitted to present his views freely and

²⁴ Compare R. 818, n. 4; Millstein, *The Federal Trade Commission and False Advertising*, 64 Colum. L. Rev. 439, 462-65 (1964); Note, *Deceptive Advertising*, 80 Harv. L. Rev. 1005, 1027-38 (1967).

²⁵ Section 326 of the Communications Act affirms "the right of free speech by means of radio communication." The FCC itself has recognized the applicability to broadcasters of this right, basic to a free society. See, e.g., *Programming Policy*, 20 P & F Radio Reg. 1901, 1905 (1960). "Radio" as used in the Communications Act embraces television as well. *Allen B. Dumont Laboratories, Inc. v. Carroll*, 184 F.2d 153 (3d Cir. 1950), cert. denied, 340 U.S. 929 (1951).

without restraint. These views may be true or false, logical or illogical, fairly stated or grossly exaggerated. That debate be watered down, made "fair" or "balanced," by Government dictate is directly contrary to the First Amendment.

This principle applies not only to individual speakers but also to the newspapers and other media by which ideas and opinion are communicated to the public. This was recognized by James Madison,²⁶ who drafted the First Amendment, and by others of his era.²⁷ It finds equal support in recent pronouncements of the Supreme Court.²⁸

Were a state to apply a Fairness Doctrine to newspapers, it would hardly survive promulgation.

(iii) *Violation of First Amendment rights of broadcasters*—The Supreme Court has struck down, as contrary to the First Amendment, many governmental attempts to require a person who would speak to pay a "price" for that right.²⁹

The Fairness Doctrine requires broadcasters to provide for the presenting of all viewpoints as the price of presenting any viewpoint on a public issue. Presentation of other viewpoints requires use of broadcast time, an extremely valuable commodity of which the broadcaster has only a fixed amount, unlike a newspaper which can easily print more pages. The presentation of the other views also can dilute the effectiveness of the broadcaster's pres-

²⁶ Madison, Report on the Virginia Resolution in 4 Elliot, Debates on the Federal Constitution 570-71 (2d ed. 1876), quoted in New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964).

²⁷ See 2 Beveridge, The Life of John Marshall 329-30 (1916); Emery, The Press and America 166-68 (2d ed. 1962) (Thomas Jefferson).

²⁸ Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 270-71 (1964); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

²⁹ See Talley v. California, 362 U.S. 60 (1960); Speiser v. Randall, 357 U.S. 513 (1958); Thomas v. Collins, 323 U.S. 516 (1945); Grosjean v. American Press Co., 297 U.S. 233 (1936); cf. Lamont v. Postmaster General, 381 U.S. 301 (1965); Shelton v. Tucker, 364 U.S. 479 (1960).

entation of the one of his selection. In addition, because the other views must be presented free if their spokesmen are unwilling to pay for their time, the Doctrine in effect requires the broadcaster to subsidize the presentation of the others. In fact the FCC's ruling in this case apparently even would require the broadcaster himself to speak if he cannot find other spokesmen.

Moreover, the Fairness Doctrine has a seriously deterrent effect on the exercise of First Amendment rights as a result of two factors.

First, the criteria of the Fairness Doctrine are ambiguous and uncertain in their application to specific circumstances and hence lead to self-censorship by broadcasters to assure compliance with the Doctrine. Cf. *Keyishian v. Board of Regents*, 385 U.S. 589, 602-04 (1967); *Sherbert v. Verner*, 374 U.S. 398, 406-09 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). This infirmity would be greatly magnified if the FCC is permitted to abandon the "reasonable man" standard, as it has in this case. And it is magnified still further by the FCC's adoption of the view that the Doctrine is triggered by a mere "implicit" expression (whatever that may mean) and is to be applied without regard to its "specifics," as the FCC opinion concludes (pp. 17-18, *supra*).

The second critical factor is the FCC's enforcement technique. A letter or telegram from any private citizen or group is enough to initiate a review of a longstanding and never before challenged industry practice. The single letter "complaint" may produce, without opportunity even to counter its arguments, a letter ruling made applicable to the entire broadcast industry. Thereafter, every broadcaster risks the loss of his business if he fails to comply immediately and fully with the FCC's letter. Hence prudence can dictate the avoidance by broadcasters of material that might trigger the Fairness Doctrine. This is the very kind of Government-imposed "self-censorship" that the

Supreme Court has held to be a vice of governmental action in the sensitive First Amendment area.³⁰

(iv) *Lack of justification for discrimination against broadcasters*—Nevertheless it has been argued that, even conceding that the Fairness Doctrine could not constitutionally be applied to newspapers, the special nature of the broadcast medium justifies this inroad on the First Amendment. Asserted technical limitations on the number of broadcast stations and the licensing scheme of the Communications Act have been pointed to in support of this discrimination. Such attempted justification fails.

In the early days of radio there was only a small number of broadcasting stations,³¹ and only a small number was thought possible.³² At that time newspapers were published in abundance. There may then have been some reason to believe that broadcasting required a different type of treatment to insure that the few who secured broadcast licenses did not misuse their favored positions.³³ See *National Broadcasting Co. v. United States*, 319 U.S. 190, 226-27 (1943).³⁴

The situation today is far different. As a result of technical advances and more sophisticated allocations by the

³⁰ *Whitehill v. Elkins*, 389 U.S. 54, 59-62 (1967); *Ashton v. Kentucky*, 384 U.S. 195, 200-01 (1966); *NAACP v. Button*, 371 U.S. 415, 432-33 (1963); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287-88 (1961); *Smith v. California*, 361 U.S. 147, 150-52 (1959).

³¹ In 1922 there were only 30 radio broadcasting stations in the United States. U.S. Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1957*, at 491 (1960).

³² See *Hearings on S. 1 and S. 1754 Before the Senate Committee on Interstate Commerce*, 69th Cong., 1st Sess. 55 (1926).

³³ This scarcity argument made no impression on the drafters of the First Amendment although the scarcity of printing presses and the technological limitations on the production of newspapers at that time were not dissimilar to those prevalent in the early days of broadcasting. See S.N.D. North, *The History & Present Condition of the Newspaper & Periodical Press of the United States* 6-9 in Tenth Census of the United States, vol. 8 (1884).

³⁴ The *NBC* case upheld a Commission regulation that prohibited broadcasters from entering into contracts with networks that contained certain clauses. The regulation was designed to reduce the networks' control over their affiliates. That regulation was not—as the Fairness Doctrine is—a directive to broadcasters as to the content of broadcast material.

FCC, both the number of available channels and the number of stations actually on the air have increased dramatically. In 1967 there were some 6,200 broadcasting stations on the air, including more than 600 television stations.³⁵ Meanwhile the number of newspapers has steadily declined; as of 1966 there were only 1,754 daily newspapers in the United States.³⁶ There are few, if any, communities in the United States that do not have more television service (not to speak of radio service) than daily newspapers. It cannot be claimed that the broadcast band is so limited that there is no room for a diversity of opinion.

In addition to the stations on the air there are about 1,200 television channels which are allocated but unused,³⁷ and many unused radio assignments. They are available for the future growth of broadcasting, to provide even more opportunity for the expression of diverse views. There is thus no reason arising from the nature and technical requirements of radio and television transmission that justifies treating broadcasters more severely than newspaper publishers for the purpose of the First Amendment.

The other argument is that, since the Communications Act requires a license under a "public interest" standard, there is public ownership of the airwaves and the broadcaster has only a "privilege" to use this public property. Since the license is only a privilege, it is said, the Government may condition it with the Fairness Doctrine.

But the "public ownership of the airwaves" is simply a catch phrase; regulation of broadcasting, as Section 1 of the Communications Act, 47 U.S.C. § 151, makes clear, is grounded in Congress's power over interstate commerce. In any event, even if a broadcast license is merely a

³⁵ U.S. Bureau of the Census, *Statistical Abstract of the United States*, No. 737 (88th ed. 1967).

³⁶ U.S. Bureau of the Census, *Statistical Abstract of the United States*, No. 746 (88th ed. 1967).

³⁷ See 47 C.F.R. § 73.606, as amended.

“privilege,” that is no ground for denial of First Amendment protection.³⁸

In sum, the invalidity of the Fairness Doctrine under the First Amendment cannot be cured by resort to the supposedly unique status of the broadcast medium.

(v) *Infringement, also, of broadcasters' Fifth Amendment rights*—It would seem also that, at least as applied in this case, the Fairness Doctrine infringes Fifth Amendment rights. The “standard” governing FCC action is so vague, the implementing procedure so cavalier, that due process is offended. The point indeed may be one of unconstitutional delegation of legislative power, particularly if, as in this case, the FCC regards itself as bound only by a limitless “public interest.” Cf. *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *United States v. Robel*, 389 U.S. 258, 269-77 (1967) (Brennan, J., concurring); *Arizona v. California*, 373 U.S. 546, 603, 624-27 (1963) (Harlan, J., dissenting).

In any case, the way is opened to such capricious administrative action, with fully effective judicial review so difficult if not practically impossible, that constitutional offense reaches beyond the First Amendment.

(vi) *Red Lion inconclusive*—While this Court, in the *Red Lion* case, now pending review in the Supreme Court,³⁹ dealt with the Fairness Doctrine both under the First Amendment and Fifth Amendment and rejected the constitutional attack, that decision does not dispose of this case. There, what was involved was a segment of the Doctrine with relatively specific contours—the personal attack segment. Furthermore, the issue raised by the Doctrine’s insistence that a broadcaster grant an individual the right

³⁸ E.g., *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958); *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156 (1946); see *Bond v. Floyd*, 385 U.S. 116, 135-37 (1966); *Kent v. Dulles*, 357 U.S. 116, 129 (1958); cf. *United States v. Robel*, 389 U.S. 258, 263-64 (1967).

³⁹ Oral argument before the Supreme Court in *Red Lion* has been postponed pending the Seventh Circuit’s decision as to the validity of a regulation adopted by the FCC dealing with the personal attack and candidate endorsement portion of the Fairness Doctrine (n.s., *supra*). 36 U.S.L.W. 3308 (Jan. 29, 1968).

to reply to a personal attack on him is quite different from the much more sweeping issue raised by the Doctrine's insistence that there never can be *any* "discussion" of *any* public issue save subject to the strictures of the Fairness Doctrine. See Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 922-23 (1963).

B. The FCC's Ruling Cannot Be Upheld as an Ad Hoc Regulation of Advertising

When the FCC comes to the final statement of its ruling—in the penultimate paragraph 64 of its opinion—it frees itself from the "specifics" of the Fairness Doctrine and relies, in fine, on the "simple fact" that its ruling is "in the public interest." (*supra*, pp. 17-18). Unable to consider a complete prohibition of cigarette commercials because the legislative history of the Cigarette Labeling Act showed that Congress had reserved that judgment to itself, the FCC determines that regardless of any "particular doctrine" the public interest requires that a broadcaster of such commercials provide counterbalancing health warnings to his listeners. (R. 855-56).

Thus broadcasting is singled out as the only advertising medium that is required to disparage the product of a client. This is indeed a novel wrinkle in the regulation of advertising media. Is it legal?

1. The FCC Has Only Limited Authority Over Broadcast Advertising

The only possible basis for regulation of advertising under the Communications Act is the broad and unspecific "public interest" standard governing FCC licensing of broadcasters.⁴⁰ But the primary Federal regulation of advertising is, of course, the Federal Trade Commission

⁴⁰ It may be noted that, while the FCC purports to base its "public interest" ruling on the broadcaster's § 315 "duty 'to operate in the public interest'" (R. 855, p. 17, *supra*), the entire sentence in which this duty is expressed relates only to the Fairness Doctrine. See H.R. Rep. No. 1069, 86th Cong., 1st Sess. 5 (1959). This "public interest" obligation, in other words, is not a requirement that is independent of the alleged codification of the Fairness Doctrine. As has already been shown, that Doctrine does not support the FCC's ruling.

Act, which prohibits "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce. . . ." Unlike banks, air carriers, other common carriers, and those subject to regulation under the Packers and Stockyards Act, which are outside the Federal Trade Commission Act's coverage, broadcasters are not exempted from that Act. That Act applies across-the-board to all advertising in all media.

As the FCC itself has noted (see pp. 41-42, *supra*), the FCC is not free, when exercising its "public interest" responsibilities, to ignore other relevant Federal statutes. In this case it must follow the standard governing all advertising that Congress has specified in the Federal Trade Commission Act.

Instructive on the limited reach of the "public interest" requirement in the Communications Act when Congress has adopted a more specific standard is *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954). The FCC there had adopted regulations providing that it would not license broadcasters who carried "give-away" programs. It did so on the basis of its conclusion that such programs were "lotteries" under Federal criminal statutes which prohibited the broadcast of "lottery" information, the mailing of "lottery" tickets, etc. 18 U.S.C. §§ 1301-04. The case went to the Supreme Court, which held the regulations invalid on the ground that the "give-away" programs were not lotteries within the meaning of these statutes. If the specific Federal statutes applicable to lotteries were not binding on the FCC, that litigation was a meaningless charade. If, in other words, the FCC were free to outlaw "give-away" programs under its "public interest" standard—whether or not they were found to be lotteries—the whole litigation as to what is or is not a "lottery" was of no more than academic interest.

That, of course, was not the case. When there is a statute that contains a more specific standard than the

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“public interest,” that standard limits the FCC, at least absent some consideration peculiar to broadcasting.⁴¹

By and large the FCC has respected this limitation on its authority, no doubt in recognition of the fact that uniformity in the treatment of advertising in different media is necessary to fair competition as between the media.⁴²

The FCC's deference to the FTC in the advertising area is firmly rooted in Congress's intent that broadcast advertising should be subject to the same rules and regulation as advertising in other media. As stated in a House Report on an early version of the 1927 Radio Act:

“Your Committee has not felt justified in forbidding or in undertaking to limit advertising through this medium, but we are unanimous in the opinion that much the same rule should apply to this form of advertising as applies to the case of newspaper advertising.” H.R. Rep. No. 719, 68th Cong., 1st Sess. 5-6 (1924).

The FCC, for example, has indicated its concern with “false, misleading, or deceptive matter” (*Programming Policy*, 20 P & F Radio Reg. 1901, 1912-13 (1960))—ad-

⁴¹ If the “public interest” standard were read as “a mere general reference to public welfare without any standard to guide determinations” (N.Y. *Central Securities Co. v. United States*, 287 U.S. 12, 24-25 (1932)), it would be unconstitutional. The “public interest” has been held to be an adequate vehicle for the exercise of delegated authority where the “standard to guide determinations” under that phrase arises from the nature of the area that is to be regulated. See *N.Y. Central Securities Co.*, *supra*; cf. *Lichter v. United States*, 334 U.S. 742, 785 (1948); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907); *Field v. Clark*, 143 U.S. 649, 693-94 (1892); *United States v. Robel*, 389 U.S. 258, 269-77 (1967) (Brennan, J., concurring). In the same way the FCC's authority to license broadcasters in the “public interest, convenience, and necessity” was upheld in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940); see *FCC v. BOA Communications, Inc.*, 346 U.S. 86, 90 (1953); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943). The term “public interest” would not be, however, a proper standard, nor could FCC action under it satisfy the Fifth Amendment's due process requirement, were it construed to give carte blanche to an agency with no relevant context to limit the power conferred. See *Kent v. Dulles*, 357 U.S. 116, 129 (1958), and the discussion by Brennan, J., in *United States v. Robel*, *supra*.

⁴² See Note, *The Regulation of Advertising*, 56 Colum. L. Rev. 1018, 1048-49, 1055-57 (1956); cf. *Head v. Board of Examiners*, 374 U.S. 424, 433, 441 (1963) (Brennan, J., concurring).

vertising, that is, that violates the Federal Trade Commission Act.⁴³ It has also informed broadcasters of advertising practices that violate that Act and has warned against carriage of advertising that has been condemned by the FTC. So that the FCC and, through it, broadcasters can be informed of such advertising, the FCC has established formal liaison with the FTC,⁴⁴ and the FCC has issued policy statements on advertising practices that have been of concern to the FTC.⁴⁵ In these instances the FCC has applied to broadcast advertising the same criteria that are applicable to advertising in other media.⁴⁶

In short, except for one or two early, isolated deviant instances,⁴⁷ the FCC has recognized that it is not free to

⁴³ Opinion No. 32, 1928-29 Opinions of the General Counsel, Federal Radio Comm'n, referred to in the FCC's opinion (R. 821-22), is an early example of this concern with what the agency considers misleading advertising, in that case certain specific cigarette commercials. That the General Counsel's opinion was limited to the problem of specific misleading advertisements is evident from the facts that, after that opinion, cigarette commercials continued to be carried, and that in a report to the Senate the Commission quoted a statement citing two cigarette companies as sponsoring particularly appealing programs. S. Doc. No. 137, 72d Cong., 1st Sess. 39 (1932).

⁴⁴ *Liaison Between FCC and FTC Relating to False and Misleading Radio and Television Advertising*, 14 P & F Radio Reg. 1262 (1957). See also 28 F.C.C. Ann. Rep. 54 (1962); 27 F.C.C. Ann. Rep. 40 (1961); 7 F.C.C. Ann. Rep. 27 (1941); 6 F.C.C. Ann. Rep. 55 (1940).

⁴⁵ *E.g.*, *Fraudulent Billing Practices*, 6 P & F Radio Reg. 2d 154 (1965); *Combination Advertising Rates*, 24 P & F Radio Reg. 930 (1963); *Double Billing Practices*, 23 P & F Radio Reg. 175 (1962); *Liaison Between FCC and FTC Relating to False and Misleading Radio and Television Advertising*, *supra*.

⁴⁶ Also where not the Federal Trade Commission Act but some other Federal statute is involved, the FCC has insisted on broadcaster compliance with the relevant statutory standard. Thus, it has objected to the carriage of advertising violating postal statutes (*Hammond-Calumet Broadcasting Corp.*, 2 F.C.C. 321 (1936); *WSBC, Inc.*, 2 F.C.C. 293 (1936); *Oak Leaves Broadcasting Station, Inc.*, 2 F.C.C. 298 (1935)); or food and drug statutes (*Hammond-Calumet Broadcasting Corp.*, *supra*; *Oak Leaves Broadcasting Station, Inc.*, *supra*).

⁴⁷ In *Knickerbocker Broadcasting Co.*, 2 F.C.C. 76, 77 (1935), the FCC disapproved the advertisement of birth control products as "offensive and contrary to the public interest." Also, many years ago, the FCC once warned that the advertising of alcoholic beverages may be taken into account adversely at license renewal time. *Broadcasting*, Feb. 15, 1934, p. 8. More recent holdings, however, undercut these early rulings. In 1958 the FCC held that the advertising of a controversial service, palm reading, was of no concern to it since the service was a lawful one under state law. *Delosa Broadcasters (WDVL)*, 16 P & F Radio Reg. 86, 100c (1958). It also has held that the advertising of beer and wine products is not an adverse factor in a comparative hearing. *WPTF Radio Co.*, 12 P & F Radio Reg. 609, 660 (1956).

do as it wishes with broadcast advertising. The most it can do is to apply to broadcast advertising the standards that Congress has specified as applicable to all advertising, at least absent some factor uniquely applicable to broadcasting which may be thought to justify different treatment of broadcast advertising.⁴⁸

2. The FCC Exceeded in This Case Whatever Authority It May Have Over Broadcast Advertising

There is no such factor in this case. The FCC's opinion advances not one reason (other than the supposed applicability of the Fairness Doctrine, a matter already dealt with (pp. 48-60, *supra*)) that cigarette advertising over radio and television should be subject to any greater restrictions than cigarette advertising in other media. The opinion is barren of any application of the FCC's expertise in the broadcasting area or of reliance on any unique aspect of broadcast cigarette advertising. It did not even examine the cigarette commercials that had been complained of in this case. And as to cigarette advertising in general, it accepted an analysis by the FTC in its 1967 Report to Congress.

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The question remains, therefore, whether this ruling can be justified under any statutory criterion applicable across-the-board to all media. The only possibly relevant statutory criterion is the Federal Trade Commission Act's prohibition of false and deceptive advertising. But the ruling cannot be supported on this basis.

First of all, not only has the FCC failed to determine that cigarette advertising is false and misleading, but it

⁴⁸ The FCC's opinion (R. 820-21) refers to cases (e.g., *KFKB Broadcasting Ass'n v. Federal Radio Comm'n*, 60 App. D.C. 79, 47 F.2d 670 (1931)) holding that it is authorized to prevent the use of broadcasting stations for essentially private interests, whether commercial, religious, or political. This line of cases obviously has no bearing on the FCC's quite limited authority to regulate advertising. As the FCC has recently made clear, the principle applied in these cases is that "decisions by a broadcasting licensee relating to either commercial or noncommercial programming must be made without regard to the private nonbroadcasting interests of the licensee." FCC Letter to WFLI, Inc., FCC 68-69, Jan. 17, 1968. (Emphasis added).

specifically refused to resolve the critical factual question necessary for any such determination. That question would be not only whether the cigarette commercials in fact make health claims, but whether the claims it makes are in fact false or deceptive. It did not even hold a hearing on any such issue and specifically says in its opinion:

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"We wish to make it clear that *this Commission* is not the proper arbiter of the scientific and medical issue here involved and of course has not sought to resolve that issue." (R. 855). (Emphasis added).

Second, assuming that the FCC had found that cigarette advertising violates the Federal Trade Commission Act standard, that finding could not support its current ruling in light of the congressional determinations underlying the Cigarette Labeling Act.

It will be recalled that, when issuing its Trade Regulation Rule in 1964, the FTC concluded that cigarette advertising without a health warning would violate Section 5 of the Federal Trade Commission Act. The FTC in its 1967 Report to Congress asserted that there has been no significant change since 1964 in those elements of cigarette advertising on which the FTC had relied in issuing its Rule. The FCC accepts the FTC position as to the content of cigarette advertising and purports to justify its current ruling on that basis. (R. 838-41).

It will be recalled also, however, that Congress gave extensive consideration, when enacting the Cigarette Labeling Act, to this FTC position—and rejected it. Congress determined that the nature of cigarette advertising was not such as to justify—prior to July 1, 1969—any requirement of a health warning other than the label on the package. While the FTC retains the authority to prohibit false and misleading cigarette advertising, the Cigarette Labeling Act prohibits any finding that cigarette advertising violates the Federal Trade Commission Act prior to July 1969 because of the failure to disclose the

asserted health hazards of smoking. That prohibited finding, however, is the only possible basis for this FCC ruling when viewed as a regulation of cigarette advertising under the standard of the Federal Trade Commission Act.

There is, therefore, no statutory source for this ruling. It must be reversed.

CONCLUSION

For the foregoing reasons, the orders of the Federal Communications Commission under review are unlawful. They should be set aside and their enforcement enjoined.

Respectfully submitted,

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APPENDIX

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 73 Stat. 557 (1959), 47 U.S.C. § 315(a), provides:

“(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.”

The Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. §§ 1331-39, provides:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the ‘Federal Cigarette Labeling and Advertising Act’.

“DECLARATION OF POLICY

“Sec. 2. It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

“DEFINITIONS

“Sec. 3. As used in this Act—

(1) The term ‘cigarette’ means—

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

(2) The term 'commerce' means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island and any place outside thereof; (B) commerce between points in any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island, but through any place outside thereof; or (C) commerce wholly within the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island.

(3) The term 'United States', when used in a geographical sense, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, and Johnston Island.

(4) The term 'package' means a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers.

(5) The term 'person' means an individual, partnership, corporation, or any other business or legal entity.

(6) The term 'sale or distribution' includes sampling or any other distribution not for sale.

"LABELING

"Sec. 4. It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement:

‘Caution: Cigarette Smoking May Be Hazardous to Your Health.’ Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

“PREEMPTION

“Sec. 5. (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

“(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

“(c) Except as is otherwise provided in subsections (a) and (b), nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes, nor to affirm or deny the Federal Trade Commission’s holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any cigarette advertisement.

“(d)(1) The Secretary of Health, Education, and Welfare shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually thereafter, concerning (A) current information on the health consequences of smoking and (B) such recommendations for legislation as he may deem appropriate.

“(2) The Federal Trade Commission shall transmit a report to the Congress not later than eighteen months after the effective date of this Act, and annually there-

after, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

"CRIMINAL PENALTY

"Sec. 6. Any person who violates the provisions of this Act shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than \$10,000.

"INJUNCTION PROCEEDINGS

"Sec. 7. The several district courts of the United States are invested with jurisdiction, for cause shown, to prevent and restrain violations of this Act upon the application of the Attorney General of the United States acting through the several United States attorneys in their several districts.

"CIGARETTES FOR EXPORT

"Sec. 8. Packages of cigarettes manufactured, imported, or packaged (1) for export from the United States or (2) for delivery to a vessel or aircraft, as supplies, for consumption beyond the jurisdiction of the internal revenue laws of the United States shall be exempt from the requirements of this Act, but such exemptions shall not apply to cigarettes manufactured, imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside of the United States.

"SEPARABILITY

"Sec. 9. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the other provisions of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

"TERMINATION OF PROVISIONS AFFECTING
REGULATION OF ADVERTISING

"Sec. 10. The provisions of this Act which affect the regulation of advertising shall terminate on July 1, 1969, but such termination shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to the date of enactment of this Act.

"EFFECTIVE DATE

"Sec. 11. This Act shall take effect on January 1, 1966."

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and
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v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA, *Respondents.*

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Nathan J. Paulson



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"This affirmative responsibility on the part of broadcast licensees to provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues has been reaffirmed by this Commission in a long series of decisions. The *United Broadcasting Co. (WHKC)* case, 10 FCC 675, emphasized that this duty included the making of reasonable provision for the discussion of controversial issues of public importance in the community served and to make sufficient time available for full discussion thereof. The *Scott* case, 3 Pike & Fischer, radio regulation 259, stated our conclusions that this duty extends to all subjects of substantial importance to the community coming within the scope of free discussion under the first amendment without regard to personal views and opinions of the licensees on the matter, or any determination by the licensee as to the possible unpopularity of the views to be expressed on the subject matter to be discussed among particular elements of the station's listening audience. Cf. *National Broadcasting Company v. United States*, 319 U.S. 190; *Allen T. Simmons*, 3 Pike & Fischer, R.R. 1029, *affirmed*; *Simmons v. Federal Communications Commission*, 169 F.2d 670, *certiorari denied*, 335 U.S. 846; *Bay State Beacon*, 3 Pike & Fischer, R.R. 1455, *affirmed*; *Bay State Beacon v. Federal Communications Commission*, U.S. App. D.C., decided December 20, 1948; *Petition of Sam Morris*, 3 Pike & Fischer, R.R. 154; *Thomas N. Beach*, 3 Pike & Fischer, R.R. 1784." 13 F.C.C. at 1249-50.

The reason for including *Sam Morris* in the string citation at this point is clear. In *Sam Morris* a broadcaster, who carried beer and wine commercials, had absolutely refused to allow discussion of the controversial temperance issue, even on sponsored time, except in connection with local option elections. *Petition of Sam Morris*, 11 F.C.C. 197, 199 (1946). The FCC held that, in view of the ob-

vious interest of large segments of the listening audience in the temperance issue, the broadcaster should not arbitrarily rule that issue off the air. As the FCC put it, his carrying of beer and wine commercials "cannot serve to diminish the duty of the broadcaster" to serve his audience. In other words, the interest of the audience, not of the broadcaster, is to govern.

But that is not the point that Mr. Banzhaf's brief seeks to make of the citation of *Sam Morris*. His brief seeks to make of it a holding as to what constitutes the broadcast of *one side* of a controversial issue. If the citation of *Sam Morris* in the *Report on Editorializing* had been intended to give it that effect, it would have been cited, not in the above passage, but in connection with the sentence following that passage. That following sentence was:

"And the Commission has made clear that in such presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise. *Mayflower Broadcasting Co.*, 8 F.C.C. 333; *United Broadcasting Co. (WHKC)*, 10 F.C.C. 815; *Cf. WBNX Broadcasting Co., Inc.*, 4 Pike & Fischer, R.R. 244 (memorandum opinion.)." 13 F.C.C. at 1250.

It is in that sentence that the FCC stated what was to become its Fairness Doctrine. And *Sam Morris* was *not* cited to that sentence. Nor, as we said in our main brief, has the FCC ever applied *Sam Morris* as meaning that ordinary commercials are a "discussion" of one side, triggering the right of reply under the Fairness Doctrine.

In the present case the requirement of *Sam Morris* has been abundantly satisfied. As the FCC itself recognized in its June 2, 1967, letter ruling, there has been no arbitrary exclusion of discussion of the cigarette-health issue—as, in *Sam Morris*, the temperance issue had been excluded.

On the contrary there has been very substantial programming of discussion of the issue. The question under the Fairness Doctrine, properly applied, is whether that discussion has been one-sided. The FCC has not suggested that there has been any such unfairness on the part of any broadcaster.

3. The Supreme Court's grant of certiorari, 389 U.S. 968 (1967), to review *Red Lion Broadcasting Co. v. FCC*, — U.S. App. D.C. —, 381 F.2d 908 (1967), is a sufficient answer to the Government's characterization, as "well-nigh frivolous" (Res. Br. p. 55), of the argument that the Fairness Doctrine as applied in this case abridges First Amendment rights.²

Only the other day, in striking down a Dallas licensing scheme for motion pictures, the Supreme Court emphasized the constitutional necessity for carefully drawn, unambiguous criteria where Government regulation extends into an area of First Amendment concern. *Interstate Circuit, Inc. v. City of Dallas*, 36 U.S.L.W. 4309 (U.S. April 22, 1968). The vices of vagueness—"the lack of guidance to those who seek to adjust their conduct and to those who seek to administer the law, as well as the possible practical curtailing of judicial review" (36 U.S.L.W. at 4312)—are not to be countenanced. For they have the effect, in practical terms, of deterring the exercise of First Amendment rights. (36 U.S.L.W. at 4311).

² The brief on behalf of Mr. Banzhaf argues not only that the Fairness Doctrine is compatible with the Constitution but that the Doctrine is constitutionally compelled, placing burdens on broadcasters which cannot be lifted by Congress. Broadcasters, however, are not public instrumentalities using public facilities (*McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597, 601 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946)); the Constitution itself imposes no obligations on broadcasters, as it does on the FCC, for example, or on the New York City Transit Authority, a public library or a school board, as held in the cases cited in Mr. Banzhaf's brief (Int. Br. p. 13).

In addition to its other constitutional infirmities, the Fairness Doctrine, as administered by the FCC, cannot square with this requirement of specificity and reasonably ascertainable criteria. That its vague standards "encourage erratic administration" (36 U.S.L.W. at 4311) is evident from a comparison of the orders under review here with the FCC's recent action on a Fairness Doctrine complaint involving announcements for the Peace Corps, Vista, the Job Corps, and Savings Bonds.³ The FCC letter ruling held that such announcements do not trigger any requirement that stations devote time to those who view these activities or programs unfavorably.

The FCC there emphasized that the Fairness Doctrine requires only a reasonable judgment by the broadcaster; here, however, no reference was made to any opportunity for a reasonable judgment by broadcasters as to whether or which cigarette commercials advocate one side of the cigarette-health issue. The Fairness Doctrine was not applied there in a situation where its application would have required the airing of views contrary to those held by the Government; the Fairness Doctrine was applied here to require the airing of a position taken by the Government. And the Peace Corps, etc., ruling was issued within a month of the cigarette ruling.

A Fairness Doctrine that allows such caprice—with the agency free to apply whatever criteria it sees fit, free, indeed, to make the result depend on what the Government's "line" may be on a particular public issue—certainly cannot withstand constitutional scrutiny.

³ The FCC's letter disposing of the complaint is printed as an Appendix hereto.

CONCLUSION

For the foregoing reasons, the orders of the Federal Communications Commission under review are unlawful. They should be set aside and their enforcement enjoined.

Respectfully submitted,

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APPENDIX

Oct 11 1967

AIR MAIL

Mr. Tibor R. Machan
Department of Philosophy
University of California
Santa Barbara, California 93106

Dear Mr. Machan:

This refers to your letter of July 12, 1967, in which you registered a complaint against television station KEYT, Santa Barbara, California, concerning the station's refusal to allow you air time to express your views on public service announcements for the Peace Corps, Vista, the Job Corps and Savings Bonds.

The selection and presentation of program material are responsibilities of the station licensee and the Commission cannot direct a station to broadcast or refrain from broadcasting a particular program. Under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from exercising the power of censorship over material broadcast.

Under the fairness doctrine, if there is a discussion of a controversial issue of public importance over a broadcast station it is the duty of the licensee to afford a reasonable opportunity for the presentation of contrasting views. For your information we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance," which sets forth the provisions of the fairness doctrine.

Pursuant to our usual practice your complaint was referred to the licensee for its comments. In its response, a copy of which was sent you, it appears therefrom that the licensee has made a judgment that these announcements for the Peace Corps, Vista, the Job Corps and Savings Bonds are not controversial issues and accordingly time for presentation of opposing viewpoints is not required. There is not sufficient evidence before us to support a contrary determination.

With respect to the ruling concerning the applicability of the fairness doctrine to broadcast of cigarette advertisements, may we point out that the Commission has stressed that this ruling is applicable to cigarette commercials only. That ruling was in the context of a situation where a controversial issue of public importance was clearly present. It is not applicable to the situation you have presented.

The licensee has considerable discretion in making judgments under the fairness doctrine. The initial determination as to whether a program involves a controversial issue of public importance is one to be made by the licensee. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee, but rather to determine whether the licensee can be said to have acted reasonably and in good faith.

In the circumstances presented here, we find that the licensee has not exceeded the wide discretion afforded it to make judgments in this area and cannot be said to have acted other than reasonably and in good faith. Therefore, no further action will be taken by the Commission with respect to this matter.

Very truly yours,

BEN F. WAPLE
Secretary

Enclosure

cc: KEYT

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The reason for including *Sam Morris* in the string citation at this point is clear. In *Sam Morris* a broadcaster, who carried beer and wine commercials, had absolutely refused to allow discussion of the controversial temperance issue, even on sponsored time, except in connection with local option elections. *Petition of Sam Morris*, 11 F.C.C. 197, 199 (1946). The FCC held that, in view of the ob-

vious interest of large segments of the listening audience in the temperance issue, the broadcaster should not arbitrarily rule that issue off the air. As the FCC put it, his carrying of beer and wine commercials "cannot serve to diminish the duty of the broadcaster" to serve his audience. In other words, the interest of the audience, not of the broadcaster, is to govern.

But that is not the point that Mr. Banzhaf's brief seeks to make of the citation of *Sam Morris*. His brief seeks to make of it a holding as to what constitutes the broadcast of *one side* of a controversial issue. If the citation of *Sam Morris* in the *Report on Editorializing* had been intended to give it that effect, it would have been cited, not in the above passage, but in connection with the sentence following that passage. That following sentence was:

"And the Commission has made clear that in such presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise. *Mayflower Broadcasting Co.*, 8 F.C.C. 333; *United Broadcasting Co. (WHKC)*, 10 F.C.C. 815; *Cf. WBNX Broadcasting Co., Inc.*, 4 Pike & Fischer, R.R. 244 (memorandum opinion.)." 13 F.C.C. at 1250.

It is in that sentence that the FCC stated what was to become its Fairness Doctrine. And *Sam Morris* was *not* cited to that sentence. Nor, as we said in our main brief, has the FCC ever applied *Sam Morris* as meaning that ordinary commercials are a "discussion" of one side, triggering the right of reply under the Fairness Doctrine.

In the present case the requirement of *Sam Morris* has been abundantly satisfied. As the FCC itself recognized in its June 2, 1967, letter ruling, there has been no arbitrary exclusion of discussion of the cigarette-health issue—as, in *Sam Morris*, the temperance issue had been excluded.

On the contrary there has been very substantial programming of discussion of the issue. The question under the Fairness Doctrine, properly applied, is whether that discussion has been one-sided. The FCC has not suggested that there has been any such unfairness on the part of any broadcaster.

3. The Supreme Court's grant of certiorari, 389 U.S. 968 (1967), to review *Red Lion Broadcasting Co. v. FCC*, — U.S. App. D.C. —, 381 F.2d 908 (1967), is a sufficient answer to the Government's characterization, as "well-nigh frivolous" (Res. Br. p. 55), of the argument that the Fairness Doctrine as applied in this case abridges First Amendment rights.²

Only the other day, in striking down a Dallas licensing scheme for motion pictures, the Supreme Court emphasized the constitutional necessity for carefully drawn, unambiguous criteria where Government regulation extends into an area of First Amendment concern. *Interstate Circuit, Inc. v. City of Dallas*, 36 U.S.L.W. 4309 (U.S. April 22, 1968). The vices of vagueness—"the lack of guidance to those who seek to adjust their conduct and to those who seek to administer the law, as well as the possible practical curtailing of judicial review" (36 U.S.L.W. at 4312)—are not to be countenanced. For they have the effect, in practical terms, of deterring the exercise of First Amendment rights. (36 U.S.L.W. at 4311).

² The brief on behalf of Mr. Banzhaf argues not only that the Fairness Doctrine is compatible with the Constitution but that the Doctrine is constitutionally compelled, placing burdens on broadcasters which cannot be lifted by Congress. Broadcasters, however, are not public instrumentalities using public facilities (*McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597, 601 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946)); the Constitution itself imposes no obligations on broadcasters, as it does on the FCC, for example, or on the New York City Transit Authority, a public library or a school board, as held in the cases cited in Mr. Banzhaf's brief (Int. Br. p. 13).

In addition to its other constitutional infirmities, the Fairness Doctrine, as administered by the FCC, cannot square with this requirement of specificity and reasonably ascertainable criteria. That its vague standards "encourage erratic administration" (36 U.S.L.W. at 4311) is evident from a comparison of the orders under review here with the FCC's recent action on a Fairness Doctrine complaint involving announcements for the Peace Corps, Vista, the Job Corps, and Savings Bonds.³ The FCC letter ruling held that such announcements do not trigger any requirement that stations devote time to those who view these activities or programs unfavorably.

The FCC there emphasized that the Fairness Doctrine requires only a reasonable judgment by the broadcaster; here, however, no reference was made to any opportunity for a reasonable judgment by broadcasters as to whether or which cigarette commercials advocate one side of the cigarette-health issue. The Fairness Doctrine was not applied there in a situation where its application would have required the airing of views contrary to those held by the Government; the Fairness Doctrine was applied here to require the airing of a position taken by the Government. And the Peace Corps, etc., ruling was issued within a month of the cigarette ruling.

A Fairness Doctrine that allows such caprice—with the agency free to apply whatever criteria it sees fit, free, indeed, to make the result depend on what the Government's "line" may be on a particular public issue—certainly cannot withstand constitutional scrutiny.

³ The FCC's letter disposing of the complaint is printed as an Appendix hereto.

CONCLUSION

For the foregoing reasons, the orders of the Federal Communications Commission under review are unlawful. They should be set aside and their enforcement enjoined.

Respectfully submitted,

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APPENDIX

Oct 11 1967

AIR MAIL

Mr. Tibor R. Machan
Department of Philosophy
University of California
Santa Barbara, California 93106

Dear Mr. Machan:

This refers to your letter of July 12, 1967, in which you registered a complaint against television station KEYT, Santa Barbara, California, concerning the station's refusal to allow you air time to express your views on public service announcements for the Peace Corps, Vista, the Job Corps and Savings Bonds.

The selection and presentation of program material are responsibilities of the station licensee and the Commission cannot direct a station to broadcast or refrain from broadcasting a particular program. Under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from exercising the power of censorship over material broadcast.

Under the fairness doctrine, if there is a discussion of a controversial issue of public importance over a broadcast station it is the duty of the licensee to afford a reasonable opportunity for the presentation of contrasting views. For your information we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance," which sets forth the provisions of the fairness doctrine.

Pursuant to our usual practice your complaint was referred to the licensee for its comments. In its response, a copy of which was sent you, it appears therefrom that the licensee has made a judgment that these announcements for the Peace Corps, Vista, the Job Corps and Savings Bonds are not controversial issues and accordingly time for presentation of opposing viewpoints is not required. There is not sufficient evidence before us to support a contrary determination.

With respect to the ruling concerning the applicability of the fairness doctrine to broadcast of cigarette advertisements, may we point out that the Commission has stressed that this ruling is applicable to cigarette commercials only. That ruling was in the context of a situation where a controversial issue of public importance was clearly present. It is not applicable to the situation you have presented.

The licensee has considerable discretion in making judgments under the fairness doctrine. The initial determination as to whether a program involves a controversial issue of public importance is one to be made by the licensee. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee, but rather to determine whether the licensee can be said to have acted reasonably and in good faith.

In the circumstances presented here, we find that the licensee has not exceeded the wide discretion afforded it to make judgments in this area and cannot be said to have acted other than reasonably and in good faith. Therefore, no further action will be taken by the Commission with respect to this matter.

Very truly yours,

BEN F. WAPLE
Secretary

Enclosure

cc: KEYT

